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Supreme Court, U.S.
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In The
Supreme Court of the United States

JUAN PEREZ,

Petitioner,

v.

CITY OF MIAMI BEACH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

With limited exceptions not relevant here, Congress vested the Courts of Appeals with jurisdiction "of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. The questions presented are:

1. Whether, contrary to the Eleventh Circuit's holding below, other circuits have correctly held that a Court of Appeals possesses appellate jurisdiction when a claimant whose principal claim has been involuntarily dismissed then voluntarily dismisses his or her remaining claims in order to seek appellate review of the involuntarily dismissed principal claim.

2. Whether, contrary to the Eleventh Circuit's approach below, other circuits have correctly held that there is a bright line rule that a judgment is final and thus appealable under 28 U.S.C. § 1291 when it dismisses all served defendants, leaving only unserved defendants in the case.

PARTIES TO THE PROCEEDING

Petitioner is Juan Perez, who was the Plaintiff and Appellant below.

Respondent is the City of Miami Beach, a municipality located in the State of Florida, which was a Defendant and Appellee below.

RULE 29.6 DISCLOSURE

Neither Petitioner nor Respondent is a nongovernmental corporation, and thus neither has a parent or publicly held company that owns ten percent or more of its stock.

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OPINIONS BELOW

All of the orders of the district court and the Eleventh Circuit are unpublished, including the district court's order granting Respondent's motion for summary judgment (App. 5-11); the district court's entry of Final Judgment (App. 12-13); the Eleventh Circuit's dismissal for lack of appellate jurisdiction after Petitioner voluntarily dismissed the unserved Defendants without prejudice (App. 14-15); the district court's re-entry of Final Judgment (App. 3-4); and the Eleventh Circuit's dismissal for lack of appellate jurisdiction after Petitioner voluntarily dismissed the unserved Defendants with prejudice (App. 1-2).

JURISDICTION

The order of the Eleventh Circuit dismissing Petitioner's appeal was entered on November 23, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Title 28 United States Code § 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the

> District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Rule 54(b) of the Federal Rules of Civil Procedure provides:

> When an action presents more than one claim for relief – whether as a claim, counterclaim, crossclaim, or third-party claim – or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

STATEMENT OF THE CASE

1. In 2005, Petitioner Juan Perez, a former employee of the City of Miami Beach, filed this civil rights action against the City in Florida state court,

alleging various federal and state claims. App. 16-19. The City removed the case to federal court based on the federal questions involved. *Id.* Petitioner then amended his pleading to add claims against several individual Defendants – Patricia Walker (his supervisor), in her individual capacity; Jorge Gonzalez (the City Manager), in his individual capacity; and unnamed "John Doe" Defendants, who were alleged to be various City supervisors and agents. App. 20-23. Petitioner never attempted to serve any of the individual Defendants.

2. The City moved for summary judgment as to each of Petitioner's claims against the City, and in January 2007 the district court granted the motion in its entirety. The court's order concluded: "It is therefore ORDERED, ADJUDGED, and DECREED that the Motion for Summary Judgment of Defendants (D.E. # 33) be, and the same is hereby GRANTED. The above-styled case be, and is hereby DISMISSED WITH PREJUDICE." App. 11. In accordance with Rule 58, the district also issued a separate document entitled "Final Judgment" which stated:

> ORDERED AND ADJUDGED that judgment is entered in favor of Defendant City of Miami Beach's Motion for Summary Judgment and against Plaintiff Juan Perez. The case, namely the entire Complaint, is dismissed with prejudice. This case is CLOSED. If applicable, this Court retains jurisdiction of the above-styled action to determine fees, costs,

> and expenses incurred by Defendant in defending this action.

App. 12.

3. Petitioner then filed a Notice of Appeal seeking review of the Final Judgment. App. 60-61. He also filed a notice of voluntary dismissal under Rule 41(a), by which he dismissed each of the individual Defendants without prejudice. App. 24-25. The Eleventh Circuit directed both sides to brief the question of its appellate jurisdiction. Petitioner contended that jurisdiction was proper and represented that he had no intention of serving the unserved Defendants; that he had voluntarily dismissed the unserved Defendants; that any claims against the unserved Defendants were likely time-barred anyway; and in any event, he would stipulate to dismissing the unserved Defendants should his earlier dismissal be deemed inoperative. App. 26-29. The City agreed that "[i]n light of the Plaintiff's Voluntary Dismissal of the other putative Defendants, and his stipulation that he would not pursue any claims against them in this action . . . the order appealed from is final and appealable." App. 30-31. But the Eleventh Circuit disagreed and dismissed the appeal for lack of jurisdiction. The court's order stated in its entirety:

> This appeal is DISMISSED for lack of jurisdiction. The January 26, 2007 order and the January 29, 2007, judgment, granting summary judgment in favor of Defendant City of Miami Beach, are not final or immediately appealable. *See* 28 U.S.C. § 1291; Fed. R. Civ.

> P. 54(b); *Vann v. Citicorp Sav. of Ill.*, 891 F.2d 1507, 1509-12 (11th Cir. 1990); *Insinga v. LaBella*, 817 F.2d 1469, 1470 and n.2 (11th Cir. 1987); *Czeremcha v. Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 724 F.2d 1552, 1554-55 (11th Cir. 1984). Appellant's voluntary dismissal of his remaining claims without prejudice did not render the district court's order and judgment final or immediately appealable. *See Druhan v. Am. Mutual Life*, 166 F.3d 1324, 1326-27 (11th Cir. 1999); *Mesa v. United States*, 61 F.3d 20, 21-22 (11th Cir. 1995).

App. 14-15.

4. Petitioner returned to the district court and requested that it renew its entry of final judgment to state explicitly that Petitioner had voluntarily dismissed the unserved Defendants. App. 32-38. The City consented to Petitioner's motion because "the unserved Defendants can never be brought into this action in light of the running of the statutes of limitation, the 120 day limit to serve parties, and the stipulation of counsel that the Plaintiff will not be pursuing this action against the two unserved Defendants." App. 39-40. The district court granted the motion, entering a renewed Final Judgment under Rule 58 that explicitly recognized that Petitioner had "voluntarily dismissed the remaining Defendants . . . " App. 3-4. Lest there be any remaining uncertainty, Petitioner then filed a Notice of Appeal from the new Final Judgment, App. 62-63, and voluntarily

dismissed the unserved Defendants *with* prejudice. App. 41.

The Eleventh Circuit again directed the parties to brief the question of appellate jurisdiction. App. 48. Petitioner asserted that his dismissal of the unserved Defendants with prejudice forever precluded him from reviving his claims against them, and thus definitively established the finality of the district court's judgment. App. 43-57. The City agreed, advising the court "that it believes the dismissal with prejudice cures the jurisdictional defect identified by the Court and renders this case final and proper for appeal." App. 58-59.

5. The Eleventh Circuit again disagreed and dismissed the appeal for lack of jurisdiction. The order was virtually identical to its earlier dismissal order:

> This appeal is DISMISSED for lack of jurisdiction. The August 8, 2007, judgment, granting summary judgment in favor of Defendant City of Miami Beach, is not final or immediately appealable. *See* 28 U.S.C. § 1291; Fed. R. Civ. P. 54(b); *Vann v. Citicorp Sav. of Ill.*, 891 F.2d 1507, 1509-12 (11th Cir. 1990); *Insinga v. LaBella*, 817 F.2d 1469, 1470 and n.2 (11th Cir. 1987); *Czeremcha v. Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 724 F.2d 1552, 1554-55 (11th Cir. 1984). Appellant's subsequent voluntary dismissal of his remaining claims with prejudice did

> not render the district court's August 8 order and judgment final or immediately appealable. *See Druhan v. Am. Mutual Life*, 166 F.3d 1324, 1326-27 (11th Cir. 1999); *Mesa v. United States*, 61 F.3d 20, 21-22 (11th Cir. 1995).

App. 1-2.

REASONS FOR GRANTING THE WRIT

The Circuits are deeply divided over an important question of federal appellate jurisdiction that potentially affects every federal litigant's right to appellate review. The question is whether appellate jurisdiction exists under 28 U.S.C. § 1291 when a claimant whose principal claim has been involuntarily dismissed then voluntarily dismisses his or her remaining claims in order to seek appellate review of the involuntarily dismissed principal claim. As the Courts of Appeals have acknowledged, their various answers to this question conflict and are sometimes internally inconsistent. *See Chappelle v. Beacon Communications Corp.*, 84 F.3d 652, 654 (2d Cir. 1996) ("The other courts of appeals are in disagreement over this question, with several of them displaying intracircuit conflicts."); *West v. Macht*, 197 F.3d 1185, 1188 (7th Cir. 1999) ("It would be an understatement to say that our precedents on this issue are difficult to harmonize."). The result is that "splits and intracircuit inconsistencies leave district court litigants and judges frustrated and uncertain about which procedure will satisfy the appellate courts and permit

an appeal to go forward." R. Cochran, *Gaining Appellate Review By "Manufacturing" A Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 MERCER L. REV. 979, 985 (Spring 1997).

Except for the Eleventh Circuit, the Circuits are divided into two camps. The first group holds that finality has been achieved – and thus appellate jurisdiction exists under § 1291 – where a claimant voluntarily dismisses the remainder of his or her claims after court-ordered dismissal of his principal claim, even when the claimant's voluntary dismissal is without prejudice. *E.g., James v. Price Stern Sloan*, 283 F.3d 1064 (9th Cir. 2002); *Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538 (8th Cir. 1990); *Division 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1976). The second group – believing that a "without prejudice" voluntary dismissal presents the unacceptable risk that a claimant is manufacturing immediate appellate jurisdiction simply by warehousing his or her peripheral claims for another day – holds that finality exists only where the claimant's voluntary dismissal is with prejudice, or where the voluntarily dismissed claims cannot be resuscitated (for example, because the applicable statute of limitations had run). *E.g., Rabbi Jacob Joseph School v. Province of Mendoza*, 425 F.3d 207 (2d Cir. 2005); *John's Insulation, Inc. v. L. Addison & Assocs., Inc.*, 156 F.3d 101 (1st Cir. 1998); *Trevino-Barton v. Pittsburgh Nat'l Bank*, 919 F.2d 874 (3d Cir. 1990). Some Circuits have zigzagged back-and-forth between the two camps (and sometimes back again),

creating intra-Circuit conflicts, and compounding the inter-Circuit conflicts.

Amidst this splintered array, the Eleventh Circuit Court stands alone, occupying a space where no other Circuit has ventured. *See* 15A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3914.8, at 358 n.16.5 (Supp. 2007) (describing the Eleventh Circuit's rule as "[t]he strictest approach yet taken"). The Eleventh Circuit holds that appellate jurisdiction is wanting even when the claimant has forever jettisoned his or her remaining claims by voluntarily dismissing them with prejudice, or in other like circumstances where there is no possibility of ever bringing them again. App. 1-2; *Druhan v. American Mut. Life*, 166 F.3d 1324 (11th Cir. 1999). Put bluntly, a claimant who voluntarily dismisses the remaining peripheral claims – even with prejudice – has no right to appeal. He or she cannot be certain that the Eleventh Circuit will review *any* of the claims. Instead of receiving a right to appeal, the most a claimant can hope to receive from the Eleventh Circuit's unyielding approach is the chance to convince the district court to certify the judgment as appealable under Federal Rule of Civil Procedure 54(b). However, the decision whether to grant such a request is discretionary, not a matter of right, *see Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956), and "an appeal under Rule 54(b) is permitted relatively rarely." Cochran, *supra*, at 993.

The Eleventh Circuit's approach is troubling not merely because it degrades a claimant's right to

appeal. It also hampers the lower courts' efficient administration of justice by forcing a claimant to engage in additional, unnecessary litigation in the district court while his or her appellate review is delayed, and in some circumstances foreclosed altogether. And it trades a bright line rule of jurisdiction for hazy uncertainty. At a systemic level, there are of course competing benefits and costs of allowing immediate appellate review of various orders, *see Johnson v. Jones*, 515 U.S. 304 (1995), but the rule applied by the Eleventh Circuit below manages to capture nearly all of the costs and none of the benefits.

In the case at bar, these problems might have been minimized – or at least temporarily avoided – if the Eleventh Circuit had adhered to the rule that a named defendant who has not been served does not count as a "party" when a court assesses whether a judgment is final under § 1291, thus rendering such judgment appealable without need for a Rule 54(b) certification. That is the rule in many circuits. *See, e.g., FSLIC v. Tullos-Pierremont*, 894 F.2d 1469 (5th Cir. 1990); *Bristol v. Fibreboard Corp.*, 789 F.2d 846 (10th Cir. 1986); *De Tore v. Local No. 245*, 615 F.2d 980 (3d Cir. 1980). *Cf.* Wright, Miller & Cooper, *supra*, § 3914.7 at 553-54 ("It is widely agreed that defendants who have not been served with process are not counted; a disposition as to all those who have been served is final.").

But the Eleventh Circuit, like the Second Circuit, refuses to disregard unserved defendants "if the district court is given reason to believe it is premature to

assume that service will not be made on the currently unserved parties[.]" *Insinga v. LaBella*, 817 F.2d 1469, 1470 n.2 (11th Cir. 1987) (citing *Leonhart v. United States*, 633 F.2d 599, 608 n.9 (2d Cir. 1980)).[1] Without elaboration, the Eleventh Circuit relied on the *Insinga* exception in its order dismissing Petitioner's appeal. App. 2. Even though the permissible time for serving the unserved Defendants had long since expired (Petitioner filed the suit in 2005 and his first Notice of Appeal was not filed until 2007), the Eleventh Circuit denied his right to appeal. This incorrect and unjust result could not have obtained if Petitioner's suit had originated in virtually any other Circuit.

This case presents the optimal vehicle for harmonizing the Courts of Appeals' cacophony regarding these crucial areas of federal jurisdiction, and for effectuating the proper balance of interests sought by § 1291. The Court should issue a writ of certiorari and vacate the Eleventh Circuit's dismissal of Petitioner's appeal.

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[1] Over the past two decades, the Seventh Circuit has repeatedly noted the Circuit split on this question but has not committed to either side. *See Ordower v. Feldman*, 826 F.2d 1569, 1573 (7th Cir. 1987) ("This problem has received differing treatment among the circuits. . . . We need not decide which of the differing approaches to take because the district court's decision would be considered final under either approach."); *Jones v. United States*, 112 F.3d 299, 300-01 (7th Cir. 1997) (following *Ordower*); *United States v. 8136 S. Dobson Street*, 125 F.3d 1076, 1081-82 (7th Cir. 1997) (following *Ordower* and *Jones*).

I. The Decision Below Conflicts with Decisions of Other Circuits

A. The Rule in Other Circuits. When the Eleventh Circuit dismissed Petitioner's first appeal, he attempted to cure the perceived jurisdictional flaw by returning to the district court, making his voluntary dismissal of the unserved Defendants explicitly a dismissal with prejudice, and inviting a renewed final judgment from which to take an appeal. These are the very steps that other Circuits have endorsed as a means to create finality.[2] The First Circuit's endorsement is explicit: "[C]urrently the proper way to appeal an interlocutory order is to move for a voluntary dismissal with prejudice, instead of delaying the case until the district court is forced to dismiss the case for failure to prosecute." *John's Insulation, Inc.*, 156 F.3d at 107. The Ninth Circuit actually chided a litigant who did not take this approach:

> Finally, we note that Cheng could easily have avoided the finality problem by simply dismissing his remaining claim and defenses without the option to pursue them should this court reverse. A plaintiff may voluntarily dismiss the remainder of his claim(s) after a partial summary judgment has been entered

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[2] It is inconsequential that Petitioner voluntarily dismissed with prejudice the unserved Defendants shortly *after* he filed his renewed Notice of Appeal, as opposed to beforehand. *See The Three Friends*, 166 U.S. 1 (1897) (discussing the doctrine of springing finality); *Otis v. City of Chicago*, 29 F.3d 1159, 1164 (7th Cir. 1994) (en banc).

> against him and then appeal the partial summary judgment. *See* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3914, at 230 (Supp.1988) (a final judgment can be manufactured by dismissing all of the remaining claims).

Cheng v. Comm'r Internal Rev. Serv., 878 F.2d 306, 311 (9th Cir. 1989). *Accord Rabbi Jacob Joseph School*, 425 F.3d at 210 ("Immediate appeal is available to a party willing to suffer voluntarily the district court's dismissal of the whole action *with prejudice*") (emphasis in original); *Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073, 1076 (9th Cir. 1994) ("dismissal [by the appellate court] is not fatal to the plaintiffs' desire for quick review; they can return immediately to this court either by dismissing the § 11 claim with prejudice (and thus 'finalizing' the partial summary judgment) or by persuading the district court to issue a Rule 54(b) certificate.").

Other Circuits, such as the Third and Fifth, have treated even a voluntary dismissal nominally taken "without prejudice" to be effectively with prejudice, therefore creating finality for immediate appeal, if the applicable statute of limitations had lapsed, thus ensuring that the voluntarily dismissed claims can never be resuscitated. *See Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1155 (3d Cir. 1986) ("Because Fassett and Buckley retained no viable cause of action against Troy, we conclude that the dismissal, which was nominally without prejudice, was for our purposes, a final dismissal."), *cert. denied sub nom.*

Turgiss v. Fassett, 481 U.S. 1070 (1987); *Carr v. Grace*, 516 F.2d 502 (5th Cir. 1975) (holding that the running of the statute of limitations made a "without prejudice" dismissal final for purposes of § 1291). Still other Circuits, including the Seventh and Eighth, have created intra-Circuit splits by occasionally requiring a formal "with prejudice" dismissal to create finality, but on other occasions tolerating something less than a formal "with prejudice" dismissal.[3]

B. The Rule in the Eleventh Circuit. Even when the voluntarily dismissed claims can never be revived – a "with prejudice" dismissal or a time-barred dismissal – the Eleventh Circuit alone has refused to permit the appeal. In *Mesa v. United States*, 61 F.3d 20, 22 n.6 (11th Cir. 1995), the Eleventh Circuit acknowledged conflict with Third Circuit's rule from *Fassett*. Four years later in *Druhan*, 166 F.3d at 1327 n.7, it acknowledged the ongoing conflict between its own holdings and those of the Second, Third, and Sixth Circuits.

In the case at bar, the court relied on *Mesa* and *Druhan* in dismissing Petitioner's appeal. App. 2.

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[3] *Compare Boland v. Engle*, 113 F.3d 706 (7th Cir. 1997) (dismissing appeal) *and Horwitz v. Alloy Automotive Co.*, 957 F.2d 1431 (7th Cir. 1992) (same) *with Division 241, Amalgamated Transit Union v. Suscy*, 538 F.3d 1264 (7th Cir. 1976) (allowing appeal) *and United States v. Kaufmann*, 985 F.2d 884 (7th Cir. 1993) (same). *Compare also DuBose v. Minnesota*, 893 F.2d 169 (8th Cir. 1990) (dismissing appeal) *with Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538 (8th Cir. 1991) (allowing appeal).

But in reality, the present case is not merely an application of *Mesa* and *Druhan*; it expands those holdings, creating an even narrower scope of appellate jurisdiction.

The court in *Mesa* was concerned that the plaintiffs' voluntarily dismissed claims might be resuscitated at a later date, effectively allowing piecemeal appellate review: "Statute of limitations matters often need much thought. And, an appellate court, such as this one is poorly situated to litigate and to decide, in the first instance, whether a statute of limitation has run to the point of barring an action[.]" 61 F.3d at 22 n.6. But no such concern is appropriate in the case at bar, because Petitioner forever waived his claims against the individual Defendants by stating explicitly that their dismissal was "with prejudice." App. 41.[4]

In *Druhan* the plaintiff was attempting to secure immediate appellate review of an order denying her motion to remand the case back to state court, by voluntarily dismissing her entire complaint and then appealing. 166 F.3d at 1325-26. The Eleventh Circuit

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[4] *Cf. Gulf States Mfrs., Inc. v. NLRB*, 579 F.2d 1298, 1306 (5th Cir. 1978) ("It will be recalled that the Union withdrew the charges with prejudice, the effect of which was to forever bar it from reinstating such charges."); *Choice Hotels Intern., Inc. v. Goodwin and Boone*, 11 F.3d 469, 471 (4th Cir. 1993) ("When a plaintiff fails to satisfy the district court's stated conditions and his action is dismissed with prejudice, the consequence is draconian – his claims, however meritorious, are forever barred from being heard on their merits.").

recognized this as a transparent end-run around 28 U.S.C. § 1292, which excludes remand orders from the categories of appealable interlocutory orders. *Id.*[5] No such concern applies here, because Petitioner did not voluntarily dismiss his entire complaint and then seek appellate review of an inherently interlocutory ruling. Rather, he sought review of an order which is indisputably final as to one Defendant, by voluntarily dismissing with prejudice the remaining Defendants, who had never been served and never appeared in the case.[6]

Thus, properly viewed, the Eleventh Circuit in the present case has staked the outer limit ever reached by a federal appellate court. *Mesa* and *Druhan* conceivably could be limited to their own facts. The present case cannot. The court's ruling is squarely at odds with that of every other Circuit to confront the question. And as we explain below, it is wrong.

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[5] *See also Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979); *Marshall v. Sielaff*, 492 F.2d 917 (3d Cir. 1974).

[6] It is irrelevant that the district court's final judgment reserved jurisdiction to adjudicate possible entitlement to attorneys' fees and costs, App. 12, because those are collateral issues which do not deprive a merits judgment of its finality. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988); 19 Moore's Federal Practice § 202.02 at p. 202-11 (3d ed. 2006).

II. The Ruling Below Significantly Imperils Petitioner's Right to Appeal and Undermines, Rather than Furthers, the Important Values Served by the Final Judgment Rule

"Finality as a condition of review is an historic characteristic of federal appellate procedure." *Cobbledick v. United States*, 309 U.S. 323, 324 (1940). "From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal." *McLish v. Roff*, 141 U.S. 661, 665-66 (1891).

As the Court has explained, the final judgment rule reflects a balance of competing considerations:

> Restricting appellate review to "final decisions" prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy. While the application of § 1291 in most cases is plain enough, determining the finality of a particular judicial order may pose a close question. No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future. We know, of course, that § 1291 does not limit appellate review to "those final judgments which terminate an action . . . ," *Cohen v. Beneficial Indus. Loan*

> *Corp.*, 337 U.S., at 545, 69 S.Ct., at 1225, but rather that the requirement of finality is to be given a "practical rather than a technical construction." *Id.*, at 546, 69 S.Ct., at 1226. The inquiry requires some evaluation of the competing considerations underlying all questions of finality – "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511, 70 S.Ct. 322, 324, 94 L.Ed. 299 (1950) (footnote omitted).

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170-71 (1974) (footnote omitted).

The Eleventh Circuit's ruling below frustrates, rather than furthers, these important values. When Petitioner voluntarily dismissed with prejudice his claims against the unserved Defendants, that dismissal ensured that the claims could not be resuscitated, meaning there was no chance of piecemeal appellate review. On the contrary, the Eleventh Circuit at that moment possessed everything that remained of the case. Denying jurisdiction under these circumstances turns the principle of finality on its head. In essence, there is *never* finality because there is never a final appealable order. The Eleventh Circuit's dismissal of Petitioner's appeal was not merely "denying [him] justice by delay," *Dickinson*,

338 U.S. at 311, it denied him the right to appeal altogether.[7]

Had the Eleventh Circuit accepted jurisdiction, this would have *vindicated* the final judgment rule:

> A peripheral claim dismissal with prejudice, however, forces the litigant to make difficult choices and to live with the consequences, while furthering the underlying purposes of the final judgment rule. The litigant can accept the adverse ruling on the central claims, take the time and money to pursue the remaining claims to trial or other completion, and then appeal. But, if the peripheral or remaining claims are judged to be weaker or ultimately less fruitful, they can be dismissed with prejudice and sacrificed to pursue an appeal on the claims that are most central to recovery for the litigant. If the case is going nowhere after a partial summary judgment or dismissal decision, then dismissal with prejudice of the peripheral claims efficiently and fairly permits an appeal that will not beget another later appeal and, thus, undermine the final judgment rule embodied in section 1291. Voluntary dismissal with prejudice followed by an appeal of the earlier adjudicated claims furthers the goal of

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[7] The time for Petitioner to seek appeal by way of certification under Rule 54(b) has long since expired, *see* Fed. R. App. P. 5(a)(2), and the wasteful option of prosecuting the peripheral claims to an adverse conclusion is unavailable because those claims were voluntarily dismissed with prejudice.

> judicial economy by permitting a plaintiff to forgo litigation on the dismissed claims while accepting the risk that if the appeal is unsuccessful, the litigation will end. Thus, the practice promotes judicial economy and preserves, rather than manipulates, the finality requirement of section 1291.

Cochran, *supra*, at 1006-07 (footnotes and quotation marks omitted).

Professors Wright, Miller and Cooper agree:

> The threat to finality posed by voluntary or invited dismissals depends on the question whether a plaintiff who loses the subsequent appeal is permitted to recapture the matters relinquished to establish finality. There is much to be said for a rule that routinely permits a plaintiff to manufacture finality by abandoning all remaining parts of a case but forbids any attempt at recapture. A good illustration is provided by *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.* [814 F.2d 90 (2d Cir. 1987)]. Summary judgment was granted against some of the plaintiff's theories, in an order that also resolved some of the issues bearing on the theories that remained open for trial. The plaintiff concluded that the remaining theories had been so limited by the order than there was no sufficient evidence to proceed to trial, and successfully moved for an order dismissing all of the remaining claims and granting the defendant's counterclaims. The court permitted this strategy as a means of securing review of

> the matters actually decided on the motion for summary judgment; the matters that had remained open for trial and were reached only by the voluntary dismissal were held abandoned in exchange for the right of immediate appeal from the summary judgment order. This course furthers all of the important values served by the final judgment rule. It provides a clear rule. Should the interlocutory rulings of the district court be affirmed, all parties and the district court are spared the burden of a trial the plaintiffs were willing to forgo for the advantage of immediate appeal. Should the rulings be reversed, the result almost surely would prove more efficient than reversal following trial on the remaining theories. Trial on the remaining theories is not likely to moot the interlocutory orders – a plaintiff who has a plausible prospect that the matters remaining open will provide the full relief sought by the matters dismissed is not likely to abandon the remaining matters to secure an immediate appeal. Other opinions have adopted this theory, and it deserves general acceptance.

Wright, Miller & Cooper, *supra*, at 623-24.

Instead the Eleventh Circuit adopted a rigid rule under which Petitioner, having failed to seek certification under Rule 54(b), forever forfeited his right to appeal.[8] But the right to ask a district court to certify

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[8] We use the term "certification" to describe Rule 54(b) process because that is how most appellate rulings describe it,

(Continued on following page)

is plainly no substitute for the right to appeal. Whether to certify under Rule 54(b) is committed to a district court's discretion, *see Sears, Roebuck & Co.*, 351 U.S. at 900-01, and "[n]ot all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims." *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980). "Because of the policy against piecemeal appeals, such certifications are rarely granted." *Hanlin v. Mitchelson*, 794 F.2d 834, 838 (2d Cir. 1986). *Accord* Cochran, *supra*, at 993 ("Rule 54(b) is an exception to 1291 finality, and an appeal under Rule 54(b) is permitted relatively rarely.") (quotation marks and citation omitted).

The counterproductive effect of the Eleventh Circuit's rule is that a claimant whose central claim has been involuntarily dismissed but whose peripheral claims are still alive must continue to litigate the weaker claims – wasting the litigants' resources and the district court's time – simply in order to secure appellate review of the only claim he or she may truly value anyway. *See* Wright, Miller & Cooper, *supra*, at 614 ("The party who has lost a vital part of the case [by summary judgment] may believe that the matters remaining open are not worth pursuing through to final judgment, or even that the case is effectively

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but we acknowledge that label may be a misnomer. *See James*, 283 F.3d at 1067 n.6.

dead even though some part remains formally alive. Voluntary dismissal of the remaining parts of the case provides an obvious means of achieving final disposition."). The claimant's only other option is to try to convince the district court that the peripheral claims are wholly distinct from the involuntarily dismissed claims, because certification under Rule 54(b) is typically denied "[i]f there is a great deal of factual or legal overlap between counts." *Horwitz*, 957 F.2d at 1434. In short, the Eleventh Circuit's holding diminishes the right to appeal to a roll of the dice, while undermining the very purposes of the final judgment rule.

Similarly misguided is the Eleventh Circuit's approach to unserved defendants. As stated previously, many Circuits apply a bright line rule that claims against unserved defendants are disregarded for purposes of assessing finality. But the Eleventh Circuit's *ad hoc* approach conditions finality on whether the court deems it likely that service on the unserved defendants will eventually be perfected. *Insinga*, 817 F.2d at 1470 n.2. The Fifth Circuit cogently identified the problems with this approach:

> *Nagle* [*v. Lee*, 807 F.2d 435, 438 (5th Cir. 1987)] articulates a generally brightline principle – where a judgment of dismissal is rendered as to all served defendants and only unserved, nonappearing defendants remain, the judgment is final and, therefore, appealable under section 1291, without a Rule 54(b) certificate. The status of all remaining

> defendants as unserved and nonappearing is dispositive of the issue. They are not parties. *Nagle* does not suggest a "quasi-party" or likelihood of further adjudication test. Rather, *Nagle* flatly states that because one of the named defendants was never served and it did not appear, it "never became a party". . . .
>
> Moreover, where no disposition has been made as to an unserved defendant, in nearly every case it is almost certain that at some time some further district court action will be taken in the case respecting the claim against that defendant, *viz.*: either the case will be dismissed prior to service, whether voluntarily or failure to prosecute or under Fed.R.Civ.P. 4(j) for failure to serve, or service will be effected and there will then be some district court disposition. A "further adjudication" exception to the rule of *Nagle*, that unserved defendants are not parties and thus need not be disposed of for a judgment dismissing all other defendants to be final, would hence be an "exception" which would necessarily swallow the rule. And, if the "further adjudication" exception has some substantially narrower meaning, it becomes so imprecise and incapable of reliable ascertainment at the relevant time as to create an almost crippling uncertainty in an area where certainty is of critical importance.

FSLIC, 894 F.2d at 1473-74 (internal citation and footnote omitted).

III. This Case Presents an Ideal Vehicle to Provide Needed Guidance to the Lower Courts

"On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary. The grant of certiorari in cases involving federal jurisdiction, practice, and procedure reflects that responsibility. Such cases qualify for review by reason of their importance, novelty, or difficulty, with a conflict of decisions also playing a significant role." R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE at 191-92 (7th ed. 1993). This Petition presents an archetypal case for exercise of this Court's supervisory authority over the lower federal courts. As previously noted, the Circuits recognize their deep division over the question, and several have candidly acknowledged that their own precedents are internally contradictory and incoherent. The situation also is negatively affecting the interaction between the federal trial and appellate courts:

> The on-going conflict within and among the circuits as to whether a voluntary dismissal is made with or without prejudice and whether such a dismissal finalizes earlier decisions has needlessly plagued district and appellate courts. The lack of precision in use of language at both levels has cost circuit and district courts considerable time and trouble. The language issue has been caused by growing mistrust, fear of manipulation, and bad motives between the courts brought

> on by the sheer number of cases passing through the federal court system.

Cochran, *supra*, at 1021.

There are no procedural flaws or other impediments to this Court's review. The Petition presents a clean, stark question of federal law that has vexed the lower courts and needs to be resolved. Until it is resolved, any federal litigant could find himself or herself in the same predicament as Petitioner – stripped of the right to appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-14141-FF

JUAN M. PEREZ,

Plaintiff-Appellant,

versus

CITY OF MIAMI BEACH,
a Municipal Corporation
of the State of Florida,
JOHN DOE 1-10;
JORGE GONZALEZ,
individually,
PATRICIA WALKER,
individually,

Defendants-Appellees,

Appeal from the United States District Court
for the Southern District of Florida

(Filed Nov. 23, 2007)

Before BARKETT, MARCUS, and WILSON, Circuit Judges.

BY THE COURT:

This appeal is DISMISSED for lack of jurisdiction. The August 8, 2007, judgment, granting summary

judgment in favor of Defendant City of Miami Beach, is not final or immediately appealable. *See* 28 U.S.C. § 1291; Fed. R. Civ. P. 54(b); *Vann v. Citicorp Sav. of Ill.*, 891 F.2d 1507, 1509-12 (11th Cir. 1990); *Insinga v. LaBella*, 817 F.2d 1469, 1470 and n.2 (11th Cir. 1987); *Czeremcha v. Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 724 F.2d 1552, 1554-55 (11th Cir. 1984). Appellant's subsequent voluntary dismissal of his remaining claims with prejudice did not render the district court's August 8 order and judgment final or immediately appealable. *See Druhan v. Am. Mutual Life*, 166 F.3d 1324, 1326-27 (11th Cir. 1999); *Mesa v. United States*, 61 F.3d 20, 21-22 (11th Cir. 1995).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 05-21545-CIV-KING/GARBER

JUAN PEREZ,

Plaintiff,

vs.

CITY OF MIAMI BEACH,

Defendant.
_____/

FINAL SUMMARY JUDGMENT

THIS COURT having previously entered a Summary Judgment on January 26, 2007 in favor of the Defendant, City of Miami Beach, and against the Plaintiff, Juan Perez, and the Plaintiff, Juan Perez, having voluntarily dismissed the remaining Defendants, and pursuant to Fed. R. Civ. P. 58 and the Court's Order Granting Defendant City of Miami Beach's Motion for Summary Judgment, it is

ORDERED AND ADJUDGED, that Final Summary Judgment is hereby entered in favor of Defendant, City of Miami Beach, and against Plaintiff, Juan Perez, and Plaintiff, Juan Perez, shall go hence without day.

This Court retains jurisdiction of the above-styled action to determine fees, costs, and expenses

incurred by Defendant, City of Miami Beach, in defending this action.

DONE AND ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 7 day of August, 2007.

/s/ James Lawrence King
United States District Judge

cc: All Attorneys of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 05-21545-CIV-KING

JUAN PEREZ,

Plaintiff,

v.

CITY OF MIAMI BEACH,

Defendants.

_____/

SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Parties' Crossmotions for Summary Judgment, filed November 22, 2006 and November 24, 2006 (DE # 33 and DE # 35). Plaintiff filed suit in State court on August 21, 2003, and the case was removed to Federal court on June 9, 2005.

I. BACKGROUND

Plaintiff, a financial specialist in the Finance Department of the City of Miami Beach (the "City") has been employed by the City since 1999. On October 29, 2001 Plaintiff sent a letter of complaint alleging irregularities in the City's accounting practices to the City Manager. (Perez Affidavit at 3). The City Manager responded by sending the Plaintiff a warning letter on April 5, 2002. The Plaintiff sent

another letter on February 10, 2003. In response to the second letter, Plaintiff was terminated on February 28, 2003. The Plaintiff timely filed a grievance action about his termination, according to the collective bargaining agreement between the City and the Plaintiff's union. His hearing on the grievance was held before a mutually agreed upon arbitrator from March 28, through April 1, 2005. (Defendant's Motion for Summary Judgment at 2-3).

The arbitration hearing thus lasted five days, and the arbitrator heard from eleven witnesses. The arbitrator decided that the City was correct to discipline the plaintiff but should not have terminated him without further warnings. The arbitrator therefore reduced the termination to a five-day suspension and reinstated Plaintiff to his position with full back pay and benefits, less five days pay. Neither party sought judicial review of the arbitrator's decision. (Defendant's Motion for Summary Judgment at 3).

Plaintiff also filed a charge of age discrimination on April 30, 2003. The Equal Employment Opportunity Commission investigated the Plaintiff's claim and concluded that it was unable to establish a violation of the statutes. It then issued its Dismissal and Notice of Rights on May 15, 2003. (Defendant's Motion for Summary Judgment at 4).

After Plaintiff was reinstated following the arbitration, he alleged that the City continued to commit adverse employment actions against him. These alleged adverse employment actions consist of

poor performance reviews, assigning him with other employees to a public desk, installing a surveillance camera which records his work area, and his supervisors telling his co-workers not to speak with him.

In the above-styled action, Plaintiff is suing for both the events which occurred before the arbitration date, and the events which occurred afterwards.

II. STANDARD OF REVIEW

Summary judgment is appropriate only where it is shown that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ. P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). If the record as a whole could not lead a rational fact-finder to find for the non-moving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). On a motion for summary judgment, the court must view the evidence and resolve all inferences in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). There is no requirement that the trial judge make findings of fact. *Id.* at 251.

The moving party bears the burden of pointing to that part of the record which shows the absence of a genuine issue of material fact. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993). If the movant meets its burden, the burden then shifts to the non-moving party to establish that a genuine

dispute of material fact exists. *Id.* To meet this burden, the non-moving party must go beyond the pleadings and "come forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Chanel, Inc. v. Italian Activewear of Florida, Inc.,* 931 F.2d 1472, 1477 (11th Cir.1991). If the evidence relied on is such that a reasonable jury could return a verdict in favor of the non-moving party, then the court should refuse to grant summary judgment. *Hairston,* 9 F.3d at 919. A mere scintilla of evidence in support of the non-moving party's position is insufficient, however, to defeat a motion for summary judgment. *Anderson,* 477 U.S. at 252. If the evidence is merely colorable or is not significantly probative, summary judgment is proper. *Id.* at 249-50.

III. DISCUSSION

A) The Plaintiff is barred from Litigating Matters Decided by Arbitration

Arbitration pursuant to Collective Bargaining Agreements, like court proceedings, bar litigants from revisiting facts and issues that have already been decided. See, for instance, *Summerville v. TWA, Inc.* 219 F. 3d 855 (8th Cir 2000), where the court held that the grievance panel determination under a collective bargaining agreement properly precluded parties from litigating issues already decided.

Plaintiff's claims for all matters that occurred prior to the litigation are barred by collateral estoppel.

Pursuant to the Public Employee Relations Act, the parties entered into a Collective Bargaining Agreement which allows a binding grievance/ arbitration process. Plaintiff wishes to litigate the issue of whether discipline for his actions was appropriate, but this issue has already been decided by the arbitrator. The arbitrator found that Plaintiff's action of writing letters to the City Manager should be considered sufficient grounds for disciplining him, although the discipline should not have taken the form of firing him without further warning. Therefore, the arbitrator's decision has determined that the decision to fire him was not a violation of his First Amendment rights, the Florida Whistleblower's Act, due process, or age discrimination. Plaintiff had the right to appeal this decision, but he chose not to do so. He accepted the arbitration and was reinstated. He now wishes this Court to determine whether the City was violating his constitutional and statutory rights by disciplining him. He does not have the right to litigate issues that have already been decided.

B) Plaintiff Has Not Plead Sufficient Facts to Show Actionable Adverse Employment Actions Occurring After the Arbitration Was Over

Plaintiff is barred from litigating all events which took place before the April 1, 2005, the date of the arbitration, by collateral estoppel. Plaintiff alleges that he continued to suffer adverse employment actions after this date; however, Plaintiff should

bring such complaints he may have since his reinstatement in a separate action from his original complaints. The facts that he has alleged in this action do not rise to an independent claim, for they do not constitute adverse employment actions. The actions taken must be "materially adverse to a reasonable employee." *Burlington Northern and Santa Fe Railway Co v. White,* 126 S.Ct. 2405, (2006). "An adverse employment action is one that is materially adverse, 'meaning more than a mere inconvenience or an alteration of job responsibilities . . . not everything that makes an employee unhappy is an actionable adverse action.'" *Hilt-Dyson v. City of Chicago,* 282 F. 3d 456, 466 (7th Cir. 2002).

Specifically, Plaintiff alleged that surveillance cameras were installed to monitor him, and that his supervisors asked other employees why they were talking to him. (Affidavit of Juan Perez at 8). Clearly, the City of Miami Beach has the right to install a camera in the workplace. The City also has the right to supervise relationships between its employees at the workplace. This includes the right to have discussions with employees regarding conversations between co-workers to insure the efficient discharge of work at the office. Taking his allegations as true, they do not constitute actionable adverse employment action.

IV. CONCLUSION

As a result of Plaintiff's having settled the matter prior through his grievance procedure, he cannot litigate his previously settled claims. The facts were decided by the arbitration that Plaintiff chose not to appeal. Plaintiff has not provided any evidence during discovery demonstrating adverse employment actions took place after his reinstatement. It is therefore,

ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment of Defendants (D.E. #33) be, and the same is hereby GRANTED. The above-styled case be, and is hereby DISMISSED WITH PREJUDICE.

DONE AND ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 26th day of January, 2007.

/s/ James Lawrence King
JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

cc: All Attorneys of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 05-21545-CIV-KING

JUAN PEREZ.

Plaintiff,

v.

CITY OF MIAMI BEACH,

Defendants.

_____/

FINAL JUDGMENT

Pursuant to Fed.R.Civ.P. 58 and the Court's Order Granting Defendant's Motion for Summary Judgment, it is

ORDERED and ADJUDGED that judgment is entered in favor of Defendant City of Miami Beach's Motion for Summary Judgment and against Plaintiff Juan Perez. The case, namely the entire Complaint, is dismissed with prejudice. This case is CLOSED. If applicable, this Court retains jurisdiction of the above-styled action to determine fees, costs, and expenses incurred by Defendant in defending this action. It is further

ORDERED and ADJUDGED that any pending motions are DENIED as moot.

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United

States Courthouse, Miami, Florida, this 26th day of January, 2007

/s/ James Lawrence King
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: All Attorneys of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-11021-JJ

JUAN M. PEREZ,

Plaintiff-Appellant,

versus

CITY OF MIAMI BEACH,
a Municipal corporation
of the State of Florida,

Defendant-Appellee,

JOHN DOES 1-10, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

(Filed May 31, 2007)

Before TJOFLAT, BIRCH, and PRYOR, Circuit Judges.

BY THE COURT:

This appeal is DISMISSED for lack of jurisdiction. The January 26, 2007, order and the January 29, 2007, judgment, granting summary judgment in favor of Defendant City of Miami Beach, are not final

or immediately appealable. *See* 28 U.S.C. § 1291; Fed. R. Civ. P. 54(b); *Vann v. Citicorp Sav. of Ill.*, 891 F.2d 1507, 1509-12 (11th Cir. 1990); *Insinga v. LaBella*, 817 F.2d 1469, 1470 and n.2 (11th Cir. 1987); *Czeremcha v. Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 724 F.2d 1552, 1554-55 (11th Cir. 1984). Appellant's voluntary dismissal of his remaining claims without prejudice did not render the district court's order and judgment final or immediately appealable. *See Druhan v. Am. Mutual Life*, 166 F.3d 1324, 1326-27 (11th Cir. 1999); *Mesa v. United States*, 61 F.3d 20, 21-22 (11th Cir. 1995).

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF FLORIDA

JUAN PEREZ,

Plaintiff,

v.

CITY OF MIAMI BEACH, a Municipal corporation of the State of Florida, and DOES 1-10

Defendant. /

CASE NO. 05-21545
CIV – KING

NOTICE OF REMOVAL

(Filed Jun. 9, 2005)

The Notice of the Defendant, CITY OF MIAMI BEACH, respectfully shows:

1. Defendant, by undersigned counsel, files this Notice of Removal of the above-captioned action presently pending in the Circuit Court of the Eleventh Judicial Circuit of Florida, Case No. 03-19558 CA 01 pursuant to the provisions of 28 U.S.C. §1441 and §1446.

2. On or about May 16, 2005 Plaintiff was granted Leave of Court to file an Amended Complaint, a copy which is annexed hereto. The Amended Complaint alleges violations of federal law, pursuant to 42 U.S.C. §2000e *et. seq.*, 42 U.S.C. §1983, as well

as related state law claims, allegedly occurring in the Southern District of Florida.

3. The above-described action is one in which this Court has original jurisdiction under the provisions of 28 U.S.C. §1331 (federal question), and is one which may be removed to this Court by the Defendant herein pursuant to the provisions 28 U.S.C. § 1441(b) (claims or rights arising under laws of the United States), §1441(c) and §1367 (supplemental jurisdiction).

4. Pursuant to 28 U.S.C. §1446(b), this Notice is being filed with this Court within thirty days after Defendant's receipt of a copy of the amended pleading setting forth the claim for relief upon which this action is based.

5. Written notice of the filing of this Notice of Removal will be given to all adverse parties as required by law.

6. A true and correct copy of this Notice will be filed with the Clerk of the Circuit Court of the Eleventh Judicial Circuit of Florida, as provided by law.

7. There is filed herewith and by reference made a part hereof a true and correct copy of all process and pleadings served upon the above-referenced Defendant in this action.

WHEREFORE, Defendant, CITY OF MIAMI BEACH, respectfully prays that this Court give effect to the removal of this action from the Circuit Court of

the Eleventh Judicial Circuit of Florida and that it assume jurisdiction of this case.

[Certificate Of Service Omitted In Printing]

IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT IN
AND FOR MIAMI-DADE
COUNTY, FLORIDA

CIVIL DIVISION

CASE NO: 03-19558-CA-01

JUDGE: DRESNICK

JUAN PEREZ,

Plaintiff

vs.

CITY OF MIAMI BEACH,
a Municipal corporation of
the State of Florida, and
DOES 1-10

Defendant. /

AMENDED COMPLAINT

Plaintiff, JUAN ANDRES PEREZ, by and through undersigned counsel, files this Complaint against Defendant CITY OF MIAMI BEACH, FLORIDA, a municipal corporation of the State of Florida, for injunctive and declaratory relief, damages, and costs and attorney's fees pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, as

amended by the Civil Rights Act of 1991, the Florida Civil Rights Act of 1992, Fla.Stat. § 760.10 *et. seq.* and under the Free speech clause of the First Amendment, and the Due Process and Clause of the Fourteenth Amendment to the United States Constitution, as secured by 42 U.S.C. § 1983, and Florida Statute 112.3187, the Whistle Blower Act.

* * *

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 05-21545-CIV-KING/GARBER

JUAN PEREZ,

Plaintiff

vs.

CITY OF MIAMI BEACH,
a Municipal corporation of
the State of Florida,
JORGE GONZALEZ,
Individually, PATRICIA
WALKER, individually
and DOES 1-10

Defendant. /

SECOND AMENDED COMPLAINT

(Filed Dec. 28, 2005)

Plaintiff, JUAN ANDRES PEREZ, by and through undersigned counsel, files this Complaint against Defendant CITY OF MIAMI BEACH, FLORIDA, a municipal corporation of the State of Florida, for injunctive and declaratory relief, damages, and costs and attorney's fees pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, as amended by the Civil Rights Act of 1991, the Florida Civil Rights Act of 1992, Fla.Stat. § 760.10 *et. seq.* and under the Free speech clause of the First Amendment, and the Due Process and Clause of the Fourteenth Amendment to the United States Constitution, as secured by 42 U.S.C. § 1983, and Florida

Statute 112.3187, the Whistle Blower Act, and the Age Discrimination in Employment Act of 1967.

NATURE OF CASE

This case involves a qualified, Hispanic, now fifty-six year old municipal employee who spoke out on matters of public importance related to his municipal employer's potential malfeasance, misfeasance and or corruption, and as a result was, *inter alia*, harassed, humiliated, denied employment opportunities and was terminated from his position.

I. GENERAL ALLEGATIONS

A. Parties

1. Plaintiff JUAN ANDRES PEREZ (hereinafter "PEREZ") is an adult, fifty-six year old, (DOB September 16, 1949) Hispanic male and a resident of Miami Dade County, Florida.

2. PEREZ has a Bachelors Degree in Accounting from the University of Havana (1973), Diploma in Langue Francaise from the Alliance Francaise Havana (1975), three diplomas from the Economic Institute of the University of Havana, Post Graduate Courses (1973 & 1974), and a Bachelors in Science degree with a major in Information Technology from Barry University (2002).

3. PEREZ had been employed by Defendant CITY OF MIAMI BEACH (hereinafter "CITY") since March 15, 1999 in a position that was reclassified

to a Financial Specialist I position in what is now known as the Finance Department.

4. CITY is a municipal corporation of the State of Florida and engaged in the business of local government, created under the laws of the State of Florida, with its principal business located in Miami Dade County, Florida.

5. As PEREZ's employer the CITY was subject to the provisions of the Florida Whistleblower Act.

6. CITY, at all times material hereto, is an employer engaged in an industry affecting commerce which has employed five hundred (500) or more employees for each working day in twenty (20) or more calendar weeks during the years 2000, 2001, 2002, 2003, and 2004.

7. At all times relevant herein, defendants, JORGE GONZALEZ (hereinafter "GONZALEZ") and PATRICIA WALKER (hereinafter "WALKER") and DOES 1-5, (hereinafter sometimes collectively referred to as "CITY DEFENDANTS" or "SUPERVISOR DEFENDANTS" when appropriate) were duly appointed managers, supervisor, and/or civilian employees, agents and representatives of the defendant CITY and representatives and were acting under color of law, to wit, under color of the statutes, ordinances, regulations, policies, customs.

8. Defendant CITY encouraged, assisted, ratified and/or with deliberate indifference failed to prevent all of the herein acts and omissions of defendants, and each of them.

9. Plaintiff, PEREZ is ignorant of the true names and capacities of defendants sued herein as DOES 1-5, inclusive, and therefore sue these defendants by such fictitious names. Plaintiff will amend this complaint to allege said defendants' true names and capacities when such are ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants are responsible in some manner for the occurrences herein alleged, and that PEREZ injuries as herein alleged were proximately caused by the acts and/or omissions of said fictitiously named defendants.

10. At all times relevant herein, defendant DOES 5 through 10 were supervisors, employees and/or policy makers for defendant CITY, which employed unlawful, organized and illegal customs and practices of threats, reprisals, cover-ups, deliberate indifference to the serious nature of allegations made by employees of the CITY, failure to reasonably monitor the allegations made by the employees of potential malfeasance, misfeasance, theft of CITY funds, and conduct investigations of said allegations and taking actions against those who brought attention to these matters by publicly speaking out on these issues, putting both, employees concerned about these issues, and the citizens of Miami Beach at risk, and improperly employing, training and supervising its officers and agents. Said misconduct was encouraged, tolerated and condoned by defendants, and each of them.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-21545-CIV-KING JUAN PEREZ

JUAN PEREZ,

Plaintiff,

vs.

CITY OF MIAMI BEACH, a Municipal corporation of the State of Florida, JORGE GONZALEZ, Individually, PATRICIA WALKER, individually and DOES 1-10, Individually,

Defendants. /

NOTICE OF VOLUNTARY DISMISSAL OF DEFENDANTS JORGE GONZALEZ, PATRICIA WALKER AND DOES 1-10

NOTICE IS HEREBY GIVEN that pursuant to Fed. R. Civ. Pro. 41(a), PLAINTIFF voluntarily dismisses the above captioned action against Defendants JORGE GONZALEZ, PATRICIA WALKER and DOES 1-10, without prejudice.

Date: April 4, 2007.

Respectfully Submitted,

s/ John DeLeon
John DcLeon
Florida Bar No. 650390

Chavez & De Leon P.A.
5975 Sunset Drive, Suite 605
South Miami, Florida 33143
305-740-5347
305-740-5348 (fax)

[Certificate Of Service Omitted In Printing]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appeal Number: 07-11021-J;
District Court No. 05-21545 CV-JLK

JUAN PEREZ,

Appellant and Plaintiff

v.

CITY OF MIAMI BEACH,

Respondent and defendant

POSITION REGARDING JURISDICTIONAL QUESTION

Perez v. City of Miami, Appeal No. 07-11021-J;
District Court No. 05-21545 CV-JLK

POSITION REGARDING JURISDICTIONAL

It is respectfully submitted this matter is a final judgment within Fed.R.Civ. P. 54(b); *Insinga v. LaBelle,* 817 F.2d. 1469, 1470 (11th Cir. 1987); and *Lorman Dev. Com. V. Daytona Hotel & Motel Supplies* 817 F.2d. 1533, 1536 (11th Cir. 1987)

More specifically, and as set forth in the accompanying declaration, it is respectfully submitted that this is a final judgment for the following reasons:

1. As set forth in my accompanying declaration, appellant has no intention of serving the un-served said defendants;

2. On April 4, 2007, I filed dismissals in this matter of the un-served defendants; and/or,

3. Given the date set for the initial trial date has now passed, procedurally the trial court would in all likelyhood not allow the claims against the un-served defendants to proceed. However, in light of the foregoing that is a moot point;

4. On April 4, 2007, I wrote opposing counsel and informed him that, should for any reason such dismissals not be effect (e.g. lack of jurisdiction of the trial court), we stipulate to such dismissal.[1]

---

[1] Appellant sought a stipulation for dismissal from the defendant. Defendant wanted the dismissal to be with prejudice. While ordinarily that would not be a problem, appellant declined to agree to that due to the Trial Court's ruling that for events after April 1, 2005, "Plaintiff should bring such complaints he may have since his reinstatement in a separate action from his original complaint." (Order Granting Summary Judgment, dated January 26, 2007, pg. 5, Exh. C. to de Leon Declaration). Accordingly, the potential waiver of such claims by a dismissal with prejudice in the within matter would arguably extend to claims not within the pending action. These claims, therefore, are not relevant to whether this is a final judgment for jurisdictional purposes within *Insinga v. LaBelle* and *Lorman Dev. Com. V. Daytona Hotel & Motel Supplies* because the Trial Court held they should have been brought in a separate action. We do recognize that the Trial Court then went on to adjudicate the claims, which complicates that matter and may be part of the subject of this appeal. However, we submit the dispositive issue is whether the judgment in this appeal is final and there is no possibility that this litigation may be reinvigorated or the judgment modified because of the un-served defendants. We believe that is the case as discussed above.

Thus, there is no likelihood that the within litigation will be invigorated by the service of such un-served defendants. Accordingly, we request that this Honorable Court find that there is jurisdiction for this matter to proceed.

Date: April 4, 2007. Respectfully Submitted,

John de Leon
Law Offices of Chavez & de Leon, P.A.
5975 Sunset Dr. Suite #605
South Miami, FL. 33143
Attorneys for Plaintiff and Appellant

By: _____
John de Leon
FL. BAR # 650390

DECLARATION OF JOHN DE LEON IN SUPPORT OF MOTION TO FILE CIVIL APPEAL STATEMENT OUT OF TIME

I, John de Leon, declare as follows:

1. I am the attorney representing the appellant in this matter. I am an attorney in good standing in the State of Florida. If called to testify to the content of this declaration, I would testify to the following from personal knowledge unless stated otherwise.

2. With respect to the un-served defendants in this matter, they have not appeared. Appellant has not intention of serving them.

3. On April 4, 2007, I caused to be filed a dismissal of all un-served defendants. True and correct copies of such dismissals are attached hereto as Exhibit "A."

4. By letter dated April 4, 2007, I wrote opposing counsel and informed him that if for any reason the clerk does not process the dismissals (e.g. due to the notice of appeal), or the matter is remanded by this Honorable Court appellant stipulates to dismiss such defendants.

5. Attached, for this Honorable Court's background, Order Granting Summary Judgment, dated January 26, 2007

On this 4th day of April, 2007, I declare the foregoing to be true and correct to the best of my knowledge under penalty of perjury.

John de Leon, Declarant
Law Offices of Chavez &
de Leon, P.A.
5975 Sunset Dr. Suite #605
South Miami, FL. 33143
Phone: (305) 740-5347
Fax: (305) 740-5348
Attorneys for Plaintiff
and Appellant

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT COURT

Appeal Case No. 07-11021

District Court No. 05-21545 CV-JLK

JUAN PEREZ,

Appellant,

v.

CITY OF MIAMI BEACH,

Appellee. /

APPELLEE'S ADVICE TO COURT ON JURISDICTIONAL QUESTION

(Filed April 5, 2007)

Appellee, CITY OF MIAMI BEACH, by and through its undersigned counsel, hereby advises the Court regarding its position on the jurisdictional question set forth by the Court.

The Defendant notes that the Plaintiff never served the other Defendants named in the First Amended Complaint.

Further it is noted that the Defendant, CITY OF MIAMI BEACH, in its Motion for Summary Judgment and Reply Memorandum, noted that these putative Defendants had not been served in the case.

In light of the Plaintiff's Voluntary Dismissal of the other putative Defendants, and his stipulation that he would not pursue any claims against them in

this action, the Defendant, CITY OF MIAMI BEACH, agrees that the order appealed from is final and appealable.

Appeal Case No. 07-11021;
District Court No. 05-21545 CV-JLK
U.S. Court of Appeals for the 11th Circuit

Respectfully submitted,

JOSE SMITH,
CITY ATTORNEY
Attorneys for Defendant
CITY OF MIAMI BEACH
1700 Convention Center Drive
4th Floor, Legal Department
Miami Beach, Florida 33139
Telephone: 305/673-7470

BY: /s/ Donald M. Papy
DONALD M. PAPY
Chief Deputy City Attorney
Florida Bar No. 204471

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-21545-CIV-KING/GARBER

JUAN PEREZ,

Plaintiff

vs.

CITY OF MIAMI BEACH,
a Municipal Corporation of the
State of Florida, JORGE GONZALEZ,
Individually, PATRICIA WALKER, individually
And DOES 1-10, individually

Defendant,

_____/

PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT FOLLOWING THE GRANTING OF SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, REQUEST FOR SCHEDULING CONFERENCE

(Filed June 29, 2007)

Pursuant to Federal Rules of Civil Procedure 56 and 58, and Local Rule 7.5, PIaintiff, Juan Andres Perez, by and through undersigned counsel, hereby respectfully move this Court for the entry of final judgment following the Court's grant of Summary Judgment to reflect finality in light of the dismissals and the United States Eleventh Circuit Court of Appeals ruling in this matter.

MEMORANDUM OF LAW

I. Introduction

The Court of Appeals dismissed plaintiff's appeal as not final and appealable because when the judgment was entered and the appeal filed there were unserved parties in this case; the individual defendants. Now that the appeal has been dismissed, and the individual defendants dismissed, it is respectfully submitted that this Honorable Court re-enter its judgment to reflect finality in light of the dismissals and the United States Eleventh Circuit Court of Appeals ruling in this matter. Thus, at this time under the criteria set by the Court of Appeal, and now that the individual defendants have been dismissed, there will be a final and appealable judgment.[1]

II. Background

Cross motions for summary judgment were heard on January 5, 2007. The Court filed an Order Granting Defendant's Motion For Summary Judgment on January 26, 2007. (DE # 50) On January 29, 2007, the final judgment in favor of Respondent was filed.

---

[1] Of course, the error in not serving or dismissing the individual defendants was the error on the part of counsel and not this Honorable Court. Plaintiff's counsel apologizes for this error. Plain [sic]

Appellant timely filed his notice of appeal on February 23, 2007. (DE # 55) Respondent did not file a cross-appeal.

On March 23, 2007, the Court of Appeals issued a "Memorandum To Counsel Or Parties" that provided "it appears that this court may lack jurisdiction over the appeal." The Court of Appeals concern focused on the fact that two of the individually named defendants had never been served or dismissed in this action.

The Court of Appeals requested that the parties simultaneously advise the Court of their position regarding the following jurisdictional question:

> "Whether the district court's January 29, 2007, final judgment – which dismisses 'the entire Complaint' with prejudice – is final and appealable, in light of the fact that 'the summary judgment was entered only against the City of Miami Beach, while two other defendants, Jorge Gonzalez and Patricia Walker were added as defendants in the first amended complaint but otherwise were never served and did not appear in the case? *See* Fed.R.Civ.P.54(b); *Insinga v. LaBella* 817 F.2d 469, 1470 (11th Cir. 1987); *Loman Dev. Co. v. Daytona Hotel & Motel Suppliers* 817 F.2d 1533, 1536 (11th Cir. 1987)" (de Leon Declaration, Exh. "1")

On April 4, 2007, plaintiff filed dismissals on the un-served individual defendants. (DE # 61)

On April 6, 2007, PIaintiff filed plaintiff's *Position Regarding Jurisdictional Question* in response to the Court of Appeal's March 23, 2007 inquiry regarding jurisdiction. Plaintiff set forth several reasons why plaintiff maintained that the Court of Appeal did have jurisdiction. (Id.) Concurrent with the *Position Regarding Jurisdictional Question,* Plaintiff's counsel wrote the defendant and stipulated that plaintiff had no intention of pursuing the action by the individuals in the within matter.

On April 6, 2007, Defendant City filed the City's response to the Court of Appeal's March 23, 2007 inquiry regarding jurisdiction. The Defendant stated it agreed with plaintiff that there was jurisdiction for plaintiff's appeal. More specifically, the City's position was:

> "In light of the Plaintiff's voluntary dismissal of the other putative Defendants, and his stipulation that he would not pursue any claims against him in this action, the defendant, CITY OF MIAMI BEACH, agrees that the order appealed from is final and appealable." (de Leon Decl. Exh. "3")

The Court of Appeals dismissed the appeal for lack of jurisdiction, in an order filed May 31, 2007, by Circuit Judges Tjoflat, Birch and Pryor. (DE # 62) The order provided, in full, as follows:

> "The appeal is DISMISSED for lack of jurisdiction. The January 26, 2007, order and the January 29, 2007, judgment, granting summary judgment in favor of the City of Miami,

are not final and immediately appealable. *See*, 28 U.S.C.§ 1291; Fed.R.Civ.P. 54(b); *Vann v. City Corp. of Ill.*, 891 1507, 1509-1512 (11th Cir. 1990); *Insinga v. LaBella* 817 F.2d 469, 1470 and note 2 (11th Cir. 1987); *Czeremcha v. International Association Of Machinists and Aerospace Workers, AFL-CIO,* 724 F 2d 1552 (11th Cir. 1984); Appellant's voluntary dismissal of his remaining claims without prejudice did not render the district court's order and judgment final or immediately appealable. *See*, *Druhan v. Am/Mutual Life,* 166 F.3d 1324, 1326-1327 (11th Cir. 1999); Mesa v. United States 61 F. 3d 20, 21-22 (11th Cir. 1999)." (DE # 62)

III. Discussion

In light of the Eleventh Circuit ruling there has been no final judgment in this matter.

The Court of Appeals For The Eleventh Circuit has held that the Court's January 26, 2007, order and the January 29, 2007, judgment, granting summary judgment in favor of the City of Miami, were not final and immediately appealable because at the time the judgment was entered and the appeal was filed there were two un-served defendants. (DE # 62) Consequently, the Court of Appeals dismissed the appeal in this matter. (DE # 62) The Court further held that plaintiff's "voluntary dismissal of his remaining claims without prejudice" after the appeal was filed "did not render the district court's order and judgment final or immediately." (Id.)

Thus, none of plaintiffs actions after the judgment, transformed the non-final and non-appealable order into one that was appealable and final retroactively.

Accordingly, it is respectfully submitted that in light of the 11th Circuit's ruling this Honorable Court should now enter final judgment to reflect finality in light of the dismissals and the United States Eleventh Circuit Court of Appeals ruling in this matter.

Unlike the when the summary judgment was granted, now the only party is the City.

It is respectfully submitted, therefore, that in light of the Court's granting of summary judgment in this matter final judgment should now be entered to reflect finality in light of the dismissals and the United States Eleventh Circuit Court of Appeals ruling in this matter.

Plaintiff, of course, would then wish to proceed with plaintiff's appeal

In the alternative, should the Court wish to proceed differently plaintiff would request a status conference to address whatever issues remain.[2]

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[2] In this respect, for the record plaintiff respectfully notes that it still takes exceptions with the Court's grant of summary judgment.

CONCLUSION

WHEREFORE, Plaintiff, JUAN ANDRES PEREZ, moves this Court to enter final judgment following this Court's granting of summary judgment to reflect finality in light of the dismissals and the United States Eleventh Court of Appeals ruling in this matter. In the alternative, should the Court wish to proceed differently plaintiff would request a status conference to address whatever issues remain.

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RESPECTFULLY SUBMITTED,

JOHN DE LEON, *TRIAL COUNSEL*
Florida Bar No.650390

/s/

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 05-21545-CIV-KING/GARBER

JUAN PEREZ,

Plaintiff,

vs.

CITY OF MIAMI BEACH,

Defendant.
_____/

DEFENDANT CITY OF MIAMI BEACH'S RESPONSE TO PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT OR, IN THE ALTERNATIVE, REQUEST FOR SCHEDULING CONFERENCE

(Filed June 29, 2007)

Defendant CITY OF MIAMI BEACH by and through undersigned counsel responds to the Plaintiff's Motion.

Because of the representations by the Plaintiff's counsel regarding the dismissal of the two unserved Defendants (Patricia Walker and Jorge Gonzalez), including his written representation to undersigned counsel that if the Eleventh Circuit remands the case that he will file the appropriate dismissals, the Defendant CITY OF MIAMI BEACH does not oppose the entry of Final Summary Judgment against the Plaintiff since the unserved Defendants can never be

brought into this action in light of the running of the statutes of limitation, the 120 day limit to serve parties, and the stipulation of counsel that the Plaintiff will not be pursuing this action against the two unserved Defendants.

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Respectfully submitted,

JOSE SMITH, CITY ATTORNEY
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By: s/Donald M. Papy
DONALD M. PAPY
Chief Deputy City Attorney
Florida Bar No. 204471

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 05-21545-CIV-KING

JUAN PEREZ,
Plaintiff
vs.
CITY OF MIAMI BEACH, a Municipal Corporation of the State of Florida, JORGE GONZALEZ, Individually, PATRICIA WALKER, Individually, and DOES 1-10, Individually
Defendants.
_____/

NOTICE OF VOLUNTARY DISMISSAL WITH PREJUDICE OF DEFENDANTS JORGE GONZALEZ, PATRICIA WALKER AND DOES 1-10

NOTICE IS HEREBY GIVEN that pursuant to Fed. R. Civ. Pro. 41(a), PLAINTIFF voluntarily dismisses the above captioned action against Defendants JORGE GONZALEZ, PATRICIA WALKER and DOES 1-10, with prejudice.

Date: September 27 2007.

Respectfully Submitted,

/s/ John De Leon

John De Leon
Florida Bar No. 650390
Chavez & De Leon P.A.
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305-740-5347
305-740-5348 (fax)

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appeal Number: 07-14141-FF;
District Court No. 05-21545 CV-JLK

JUAN PEREZ,

Appellant and Plaintiff

v.

CITY OF MIAMI BEACH,

Respondent and defendant

POSITION REGARDING JURISDICTIONAL QUESTION

(Filed Oct. 1, 2007)

POSITION REGARDING JURISDICTIONAL

This responds to the Court's September 14, 2007, "Memorandum To Counsel Or Parties" requesting the parties' position on the jurisdictional issue.

I. Background

Cross motions for summary judgment were heard on January 5, 2007. The Court filed an Order Granting Defendant's Motion For Summary Judgment on January 26, 2007. (DE # 50) On January 29, 2007, the final judgment in favor of Respondent was filed.

Appellant timely filed his notice of appeal on February 23, 2007. (DE # 55) Respondent did not file a cross-appeal.

On March 23, 2007, the Court of Appeals issued a "Memorandum To Counsel Or Parties" that provided "it appears that this court may lack jurisdiction over the appeal." (de Leon Decl., Exhibit "A"). The Court of Appeals concern focused on the fact that two of the individually named defendants had never been served or dismissed in this action.

The Court of Appeals requested that the parties simultaneously advise the Court of their position regarding the following jurisdictional question:

> "Whether the district court's January 29, 2007, final judgment – which dismisses 'the entire Complaint' with prejudice – is final and appealable, in light of the fact that the summary judgment was entered only against the City of Miami Beach, while two other defendants, Jorge Gonzalez and Patricia Walker were added as defendants in the first amended complaint but otherwise were never served and did not appear in the case? *See* Fed.R.Civ.P.54(b); *Insinga v. LaBella* 817 F.2d 469, 1470 (11th Cir. 1987); *Loman Dev. Co. v. Daytona Hotel & Motel Suppliers* 817 F.2d 1533, 1536 (11th Cir. 1987)" (de Leon Declaration, Exhibit "A")

On April 4, 2007, plaintiff filed dismissals on the un-served individual defendants. (DE # 61)

On April 6, 2007, Plaintiff filed plaintiff's *Position Regarding Jurisdictional Question* in response to the Court of Appeal's March 23, 2007 inquiry regarding jurisdiction. Plaintiff set forth several reasons

why plaintiff maintained that the Court of Appeal did have jurisdiction. Concurrent with the *Position Regarding Jurisdictional Question,* Plaintiff's counsel wrote the defendant and stipulated that plaintiff had no intention of pursuing the action by the individuals in the within matter.

On April 6, 2007, Defendant City filed the City's response to the Court of Appeal's March 23, 2007 inquiry regarding jurisdiction. The Defendant stated it agreed with plaintiff that there was jurisdiction for plaintiff's appeal. More specifically, the City's position was:

> "In light of the Plaintiff's voluntary dismissal of the other putative Defendants, and his stipulation that he would not pursue any claims against him in this action, the defendant, CITY OF MIAMI BEACH, agrees that the order appealed from is final and appealable."

The Court of Appeals dismissed the appeal for lack of jurisdiction, in an order filed May 31, 2007, by Circuit Judges Tjoflat, Birch and Pryor. (DE # 62) The order provided, in full, as follows:

> "The appeal is DISMISSED for lack of jurisdiction. The January 26, 2007, order and the January 29, 2007, judgment, granting summary judgment in favor of the City of Miami, are not final and immediately appealable. *See*, 28 U.S.C.§ 1291; Fed.R.Civ.P. 54(b); *Vann v. City Corp. of Ill.*, 891 1507, 1509-1512 (11th Cir. 1990); *Insinga v. LaBella* 817

> F.2d 469, 1470 and note 2 (11th Cir. 1987); *Czeremcha v. International Association Of Machinists and Aerospace Workers, AFL-CIO,* 724 F 2d 1552 (11th Cir. 1984); Appellant's voluntary dismissal of his remaining claims without prejudice did not render the district court's order and judgment final or immediately appealable. *See, Druhan v. Am/ Mutual Life,* 166 F.3d 1324, 1326-1327 (11th Cir. 1999); Mesa v. United States 61 F. 3d 20, 21-22 (11th Cir. 1999)." (DE # 62)

Perez then filed a motion, entitled *Plaintiffs Motion For Entry Of Final Judgment Following The Granting Of Summary Judgment Or, In The Alternative, Request For Scheduling Conference ("Plaintiffs Motion"),* at the district court seeking entry of final judgment in light of the stipulation to not proceed by the individual defendants. (DE # 63) Perez represented in such motion that "[c]oncurrent with the *Position Regarding Jurisdictional Question,* Plaintiff's Counsel wrote the defendant and stipulated that plaintiff had no intention of pursing the action by the individuals in the within matter." (Id. at pg. 3)

The City did not object. (DE # 67) The City's Response stated:

> "Because of the representations by plaintiffs counsel regarding the dismissal of the two unserved defendants (Patricia Walker and Jorge Gonzalez), including his written representation to the undersigned counsel that if the 11th Circuit remands the case he will file appropriate dismissals the **defendant CITY**

> **OF MIAMI BEACH does not oppose the entry of Final Summary Judgment against the plaintiffs since the unserved defendants can never be brought into this action in light of the running of the statute of limitations, the 120 day limit to serve parties, and the stipulation of counsel that the plaintiff will not be pursing this action against the two unserved defendants.**" (DE # 67, *Defendant City of Miami Beach's Response To Plaintiff's Motion For Entry Of Final Judgment Or, In The Alternative, A Scheduling Conference,* pg. 1 ("*Response*") (Emphasis Added))

Judge King then granted Final Summary Judgment in light of the dismissal of the individual defendants. (DE #72) Perez then filed a Notice of Appeal. (DE #72)

Then, Perez filed dismissals with prejudice for the individual defendants on September 27, 2007. (DE # 74; de Leon Decl. Exhibit. "A")) Plaintiff also reaffirmed the prior stipulation to not pursue the individual claims. (de Leon Decl. Exhibit. "B") Plaintiff wrote:

> "I want to reaffirm that we have no intention of proceeding against the unnamed individual defendants. Please view this letter as reaffirming my prior stipulation to you to this effect, by letter in April 2007, and as stated in pleading filed before the Court. These stipulations are unconditional. . (de Leon Decl. Exhibit. "B")

The Court of Appeals, on September 14, 2007, again issues a jurisdictional question:

> "Whether the district court's August 7, 2007, judgment granting summary judgment in favor of defendant City of Miami Beach is final and immediately appealable in light (1) the plaintiff's voluntary dismissal of his claims against the remaining defendants without prejudice; and (2) the district court's failure to certify the August 7 judgment for immediate appeal pursuant to Fed.R.Civ.P. 54(b)? *See* 28 U.S.C. § 1291; Fed.R.Civ.P. 54(b); *State Treasurer of the State of Michigan v. Barry* 168 F.3d. 8, 11-16 (11th Cir. 1999); *Constr. Aggregates, Ltd. V. Forest Commodities Corp.,* 147 F. 3d 1334, 1336-1337 (11th Cir. 1998); *Mesa v. United States* 61 F. 3d 20, 22 (11th Cir. 1995); *Williams v. Bishop,* 732 F.2d 885, 885-86 (11th Cir. 1984); *Lex Tex Ltd. V. Unifi, Inc. (In re Yam Processing Patent Validity Litig.)* 680 F.2d 1338, 1340 (11th Cir. 1982).

II. Discussion

In *State Treasurer of the State of Michigan v. Barry* 168 F.3d. 8, 11-16 (11th Cir. 1999), the Court held that "[t]he teaching of *Construction Aggregates, Mesa,* and *Ryan* is that voluntary dismissals, granted without prejudice, are not final decisions themselves and also do not transform an earlier partial dismissal or partial summary judgment order into a final decision." The Court, however, then expressly recognized

that where there has been a sufficient renunciation of the ability to proceed appellate jurisdiction would be proper:

> "**This is not a case where the parties have during the appeal renounced their ability to proceed on their remaining claims after the appeal is decided.** See *Scarbrough v. Perez,* 870 F.2d 1079, 1082 (6th Cir.1989) (permitting appeal to proceed after counsel abandoned claims at oral argument); *Tiernan v. Devoe,* 923 F.2d 1024, 1031 (3d Cir.1991) (permitting appeal to proceed when claims were renounced several months after the appeal was filed).
>
> During oral argument, Plaintiff represented for the first time that Defendants would agree to renounce their remaining counterclaim, but only if Defendants were to prevail on appeal regarding Plaintiffs breach of contract claims. This conditional renunciation does not affect our analysis because basing appellate jurisdiction on it also would undermine the purposes of Ryan's rule." (*State Treasurer of the State of Michigan v. Barry* 168 F.3d. at 13, fn. 8 (Emphasis added))

What constitutes sufficient renunciation is also discussed in *Tiernan v. Devoe,* 923 F.2d 1024, 1031 (3d Cir.1991), which was cited by *State Treasurer of the State of Michigan v. Barry.* In *Tiernan v. Devoe* it was held that:

> "[B]ut this dismissal was, for some of the plaintiffs, without prejudice. Some plaintiffs

> retained the ability to reinstitute part of this litigation. Thus, at the time this appeal was filed, jurisdiction under 28 U.S.C. § 1291 was lacking.
>
> That defect has since been cured. Several months after this appeal was filed, plaintiffs renounced, through letter briefs, any intention to take further action against the Devoe Defendants. Therefore, we now have jurisdiction over this appeal." (*Tiernan v. Devoe,* 923 F.2d at1031 (citations omitted)).

Perez, after the remand, has filed pleadings that repeatedly and unconditionally renounced his ability to re-file the litigation by the dismissed individual defendants.

Perez reaffirmed the renunciation in the *Plaintiffs Motion.* (DE # 63) Perez represented in such motion that "[c]oncurrent with the *Position Regarding Jurisdictional Question,* Plaintiff's Counsel wrote the defendant and stipulated that plaintiff had no intention of pursing the action by the individuals in the within matter." (Id. at pg. 3)

These representations were relied on by the City. The City, in its response to Perez's Motion, recognized this and stated:

> "[t]he defendant CITY OF MIAMI BEACH does not oppose the entry of Final Summary Judgment against the plaintiffs since the unserved defendants can never be brought into this action in light of the running of the statute of limitations, the 120 day limit to

> serve parties, and the stipulation of counsel that the plaintiff will not be pursing this action against the two unserved defendants." (DE # 67, *Response*)

Then, Perez filed dismissals *with* prejudice for the individual defendants on September 27, 2007. (DE # 72; de Leon Decl. Exhibit "A")) Plaintiff also reaffirmed the prior stipulation to not pursue the individual claims. (de Leon Decl. Exhibit. "B")

Perez has filed dismissals, including the recent dismissal with prejudice, against the unserved parties. Further, Perez has made representations to the trial court, to the Eleventh Circuit, and to opposing counsel/defendant that Perez will not pursue any action against the unserved and dismissed parties.

Perez has stipulated to opposing counsel/ defendant that they will not re-file against the individual defendants. The defendant relied on these representations at both the appellate and trial level "noting that unserved defendants can never be brought into this action in light of the running of the statute of limitations, the 120 day limit to serve parties, and the stipulation of counsel that the plaintiff will not be pursing this action against the two unserved defendants." (DE # 67, *Response*)

It is respectfully submitted that it would be impossible for Perez to re-file against these defendants and re-institute the litigation at this point, especially given the post-remand representations to the trial court, opposing counsel, this Honorable

Court, plus the dismissals with prejudice. Accordingly, any action against these parties have fully been renounced under *State Treasurer of the State of Michigan v. Barry* 168 F.3d. at 13, fn 8 and *Tiernan v. Devoe,* 923 F.2d at 1031.

Further, there is no pending action or unresolved issue regarding these defendants (in addition to the renunciation by Perez). Accordingly, it is respectfully submitted that jurisdiction is proper under *Insinga v. LaBella* 817 F.2d 469, 1470 and note 2 (11th Cir. 1987).

Perez, after remand, did not view a Rule 54(b) certification as proper because it was after the individual defendants had already been voluntarily dismissed the first time (albeit without prejudice). Since there were no other parties in the case, at that time counsel felt proceeding under Rule 54(b) was not proper.[1]

III. Conclusion

Thus, there is no likelihood that the within litigation will be invigorated by the service of such un-served defendants. Accordingly, we request that this Honorable Court find that there is jurisdiction for this matter to proceed.

---

[1] Of course, if this Court disagrees Perez, upon remand, will so proceed.

Date: September 28, 2007.

Respectfully Submitted,

John de Leon
Law Offices of Chavez & de Leon, P.A.
5975 Sunset Dr. Suite #605
South Miami, FL. 33143
Attorneys for Plaintiff and Appellant

By: /s/ _____
John de Leon
FL. BAR # 650390

DECLARATION OF JOHN DE LEON IN SUPPORT OF POSITION REGARDING JURISDICTIONAL QUESTION

I, John de Leon, declare as follows:

1. I am the attorney representing the appellant in this matter. I am an attorney in good standing in the State of Florida. If called to testify to the content of this declaration, I would testify to the following from personal knowledge unless stated otherwise.

2. On September 27, 2007, I caused to be filed a dismissals with prejudice of all un-served defendants. True and correct copies of such dismissals are attached hereto as Exhibit "A."

3. Attached as Exhibit "B" is a true and correct copy of a letter I caused to be sent to Attorney Papy on September 27, 2007.

On this 28th day of September, 2007, I declare the foregoing to be true and correct to the best of my knowledge under penalty of perjury.

/s/ _____

John de Leon, Declarant
Law Offices of Chavez & de Leon, P.A.
5975 Sunset Dr. Suite #605
South Miami, FL. 33143
Phone: (305) 740-5347
Fax: (305) 740-5348
Attorneys for Plaintiff and Appellant

[Certificate Of Service Omitted In Printing]

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 05-21545-CIV-KING

JUAN PEREZ,
Plaintiff,
vs.
CITY OF MIAMI BEACH,
a municipal corporation of the
State of Florida, JORGE GONZALEZ,
Individually, PATRICIA WALKER, Individually
and DOES 1-10, Individually
Defendants.
_____/

NOTICE OF VOLUNTARY DISMISSAL WITH PREJUDICE OF DEFENDANTS JORGE GONZALEZ, PATRICIA WALKER AND DOES 1-10

NOTICE IS HEREBY GIVEN that pursuant to Fed. R. Civ. Pro. 41(a), PLAINTIFF voluntarily dismisses the above captioned action against Defendants JORGE GONZALEZ, PATRICIA WALKER and DOES 1-10, with prejudice.

Date: September 27 2007.

Respectfully Submitted,

/s/ John De Leon

John De Leon
Florida Bar No. 650390
Chavez & De Leon P.A.
5975 Sunset Drive, Suite 605
South Miami, Florida 33143
305-740-5347
305-740-5348 (fax)

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EXHIBIT 2

LAW OFFICES OF
CHAVEZ & DE LEON, P.A.

JOHN de LEON, ESQ.

5975 Sunset Dr. #605
S. Miami, FL. 33143
Telephone: 305-740-5847/877-740-0300
Fax: 305-740-5348

September 27, 2007

Via Facsimile and U.S. Mail
((305) 673 7002)

Donald M. Papy, Esq.
Chief Deputy City Attorney
City of Miami Beach, Florida
1700 Convention Center Drive
Fourth Floor
Miami, FL 33139

Re: Perez v. City of Miami Beach
Appeal No.07-11021-JJ
USDC S.D. Fla. No. 05-21545-CIV
(Jurisdictional Issue; Un-served Defendants)

Dear Mr. Papy:

Thank you for discussing this matter with me.

I want to reaffirm that we have no intention of proceeding against the unnamed individual defendants. Please view this letter as reaffirming my prior stipulation to you to this effect, by letter in April 2007, and as stated in pleading filed before the Court. These stipulations are unconditional.

Please do not hesitate to telephone me if you wish to discuss this further.

Very truly yours,

/s/
John de Leon
Attorney at Law

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT COURT

Appeal Case No. 07-14141-FF

District Court No. 05-21545 CV-JLK

JUAN PEREZ,

Appellant,

vs.

CITY OF MIAMI BEACH,

Appellee.

_____/

APPELLEE'S ADVICE TO COURT ON JURISDICTIONAL QUESTION

(Filed Sep. 28, 2007)

Appellee, City of Miami Beach, by and through their undersigned counsel, hereby advises the Court regarding its position on the jurisdictional question set forth by the Court.

In accordance with the authority set forth in the Court's request for advice, Perez has filed a voluntary dismissal with prejudice as to the two unserved defendants. A copy of that dismissal is attached hereto. The City hereby advises the Court that it believes the dismissal with prejudice cures the jurisdictional defect identified by the Court and renders this case final and proper for appeal.

Respectfully submitted,

JOSE SMITH, CITY ATTORNEY
Attorneys for Defendant
CITY OF MIAMI BEACH
1700 Convention Center Drive
4th Floor, Legal Department
Miami Beach, Florida 33139
Telephone: 305.673.7470
Facsimile: 305.673.7002

By: /s/ Donald Papy
Donald M. Papy
Chief Deputy City Attorney
Florida Bar No. 204471

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-21545-CIV-KING/GARBER

JUAN PEREZ,

Plaintiff

vs.

CITY OF MIAMI BEACH, a Municipal Corporation of the State of Florida, JORGE GONZALEZ, Individually, PATRICIA WALKER, individually And DOES 1-10, individually

Defendant. /

NOTICE OF APPEAL

(Filed Feb. 23, 2007)

Notice is hereby given that JUAN ANDRES PEREZ, Plaintiff in the above named case, appeals to the United States Court of Appeals for the Eleventh Circuit from the Final Judgment and Granting Summary Judgment for Defendant entered in this action on January 26, 2007.

RESPECTFULLY SUBMITTED,

JOHN DE LEON, *TRIAL COUNSEL*
Florida Bar No.650390

/s/ John De Leon
LAW OFFICES OF CHAVEZ & DE LEON, P.A.
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[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-21545-CIV-KING/GARBER

JUAN PEREZ,

Plaintiff

vs.

CITY OF MIAMI BEACH,
a Municipal Corporation
of the State of Florida,
JORGE GONZALEZ,
Individually, PATRICIA
WALKER, individually And
DOES 1-10, individually

Defendant. /

AMENDED NOTICE OF APPEAL

(Filed Sep. 1, 2007)

Notice is hereby given that JUAN ANDRES PEREZ, Plaintiff in the above named case, appeals to the United States Court of Appeals for the Eleventh Circuit from the Final Judgment and Granting Summary Judgment for Defendant entered in this action on August 7, 2007, including the Court's granting of Summary Judgment on January 26, 2007.

RESPECTFULLY SUBMITTED,

JOHN DE LEON, *TRIAL COUNSEL*
Florida Bar No.650390

/s/
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(2)

No. 07-1092

FILED

MAR 26 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JUAN PEREZ,

Petitioner,

v.

CITY OF MIAMI BEACH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

With limited exceptions not relevant here, Congress vested the Courts of Appeals with jurisdiction "of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. The questions presented are:

1. Whether the Eleventh Circuit correctly adhered to the same bright-line rule as the other circuits holding that unserved defendants do not interfere with finality under § 1291.

2. Whether the Eleventh Circuit correctly adhered to the rule that appellate jurisdiction over a judgment adjudicating some claims cannot be created by dismissing the remaining claims without prejudice.

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STATEMENT OF THE CASE

1. On January 26, 2007, the district court entered a final judgment in the City's favor. At the time, two other defendants who Petitioner had added to the lawsuit in his First Amended Complaint, remained unserved. Petitioner did not seek from the district court a Fed. R. Civ. P. 54(b) certification of that judgment.

2. On February 23, 2007, Petitioner filed his first notice of appeal. On March 23, 2007, the Eleventh Circuit sought advice (Res. App. 1-3)[1] regarding whether the two unserved defendants interfered with the finality of the final judgment from which he was appealing.

3. The request for advice cited *Insinga v. LaBella*, 817 F.2d 1469 (11th Cir. 1987) and *Loman Dev. Co. v. Daytona Hotel & Motel Suppliers*, 817 F.2d 1533 (11th Cir. 1987), Eleventh Circuit precedent holding that unserved defendants were not considered parties under Rule 54(b) and would not affect the finality of a final judgment disposing of the remainder of the case.

4. On April 4, 2007, Petitioner filed his response to the request for advice (entitled "Position Regarding Jurisdictional Question"). Rather than merely confirming in that response, however, that Petitioner did

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[1] (Res. App. ___) refers to Respondent's Appendix attached hereto.

not intend to proceed against the two subsequently added but unserved defendants and that appellate jurisdiction was proper under *Insinga*, Petitioner voluntarily dismissed without prejudice the two unserved defendants. Petitioner admitted in his response that he refused the City's urging that the dismissals be with prejudice because Petitioner did not want to waive certain claims against the two unserved defendants.

5. On May 31, 2007, the Eleventh Circuit Court of Appeals dismissed Petitioner's appeal citing, *inter alia*, *Mesa v. United States*, 61 F.3d 20 (11th Cir. 1995) and *Druhan v. American Mut. Life*, 166 F.3d 1324 (11th Cir. 1999), its authority holding that dismissals without prejudice as to some defendants interfered with the finality of a judgment as to the other defendants.

6. Apparently perceiving (albeit incorrectly) that the issue interfering with finality was the district court's failure to issue an order recognizing the voluntary dismissals without prejudice, Petitioner sought and on August 7, 2007 obtained a second order of final judgment from the district court recognizing the voluntary dismissals of the two remaining defendants. Petitioner did not seek a Rule 54(b) certification of that final judgment. On September 1, 2007, Petitioner filed a notice of appeal from the new August 7th final judgment.

7. On September 14, 2007, the Eleventh Circuit again asked for advice regarding the finality of the

final judgment and again cited, *inter alia*, *Mesa* and *Druhan*. (Res. App. 4-6)[2]

8. On September 27, 2007, apparently realizing that only dismissals with prejudice of the two defendants would create finality for appellate review, Petitioner voluntarily dismissed with prejudice the two remaining defendants. Those defendants, however, had already been dismissed from the case (albeit without prejudice) and Petitioner did not first seek to have his claims against them reinstated. On November 23, 2007, the Eleventh Circuit again dismissed Petitioner's appeal.[3]

---

[2] The City filed responses to both requests for advice stating that it believed that the Eleventh Circuit had jurisdiction. Upon further analysis, the City believes that the Eleventh Circuit was correct that it did not have jurisdiction. The City's responses to the contrary, however, are inconsequential because parties cannot stipulate to jurisdiction. *Matter of Kutner*, 656 F.2d 1107 (5th Cir. 1981).

[3] In addition to the foregoing Statement of the Case, the City corrects Petitioner's statement that he is a former employee of the City. (Petition at 2.) Petitioner is currently employed by the City. (App. at 6.)

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT ADHERED TO THE SAME BRIGHT-LINE RULE AS THE OTHER CIRCUITS REGARDING UNSERVED DEFENDANTS

Without merit is Petitioner's argument that the Eleventh Circuit disregards the bright-line rule followed by the other circuits that unserved defendants are not parties for Rule 54(b) purposes and do not interfere with the finality of a judgment entered against the other defendants. In *Insinga v. LaBella*, 817 F.2d 1469 (11th Cir. 1987), the Eleventh Circuit made its position clear:

> All other circuits which have addressed this issue have held that where an action is dismissed as to all defendants who have been served and only unserved defendants remain, the district court's judgment may be considered a final appealable order. *See Bristol v. Fibreboard Corp.*, 789 F.2d 846, 847 (10th Cir. 1986); *Patchick v. Kensington Publishing Corp.*, 743 F.2d 675, 677 (9th Cir. 1984); *Leonhard v. United States*, 633 F.2d 599, 608 (2d Cir. 1980), *cert. denied*, 451 U.S. 908, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981); *United States v. Studivant*, 529 F.2d 673, 674 n. 2 (3d Cir. 1976). These courts reason that a defendant who has not been served with process is not a party for purposes of Fed.R.Civ.P. 54(b). With only an unserved defendant remaining, there is no reason to assume that there will be any further

> adjudication of the action. *We find this unanimous authority to be persuasive.*

Insinga, 817 F.2d at 1470 (emphasis added). And, the Eleventh Circuit disavowed earlier binding authority to the contrary:

> We acknowledge that a decision of the former Fifth Circuit, *Lohr v. United States*, 264 F.2d 619 (5th Cir. 1959), might appear to dictate a different result. *Lohr* involved a single claim against multiple defendants, two of whom were never served with process. The court held that the existence of the unserved defendants destroyed the finality of a judgment which disposed of the plaintiff's claims against the served defendants, therefore the plaintiff's appeal was dismissed. We note, however, that *Lohr* was decided nearly thirty years ago, without the benefit of the thoughtful analyses provided by our sister circuits. Moreover, *Lohr* was decided under the pre-1961 version of Rule 54(b), which addressed only multiple claims but was silent as to multiple parties. *See* Fed. R. Civ. P. 54(b) (advisory committee note to 1961 amendments). For these reasons, we are convinced that *Lohr* is no longer good law on the question of the appealability of the district court judgment in this case.

Insinga, 817 F.2d at 1470, n. 3.

Moreover, *FSLIC v. Tullos-Pierremont*, 894 F.2d 1469 (5th Cir. 1990), the opinion which Petitioner cites (and extensively quotes) as the authority

properly applying the correct bright-line rule regarding unserved defendants, specifically relies on *Insinga*. *FSLIC*, 894 F.2d at 1471-72. Further, footnote 2 in *Insinga*, which Petitioner cites as establishing that the Eleventh Circuit takes an *ad hoc* (not bright-line) approach to unserved defendants, in fact establishes the opposite. That footnote provides:

> Of course, if the district court is given reason to believe that it is premature to assume that service will not be made on the currently unserved parties, it can direct that final judgment under Fed. R. Civ. P. 58 not be entered until further order of the court. *See Leonhard,* 633 F.2d at 608 n. 9; *cf. Patchick,* 743 F.2d at 677 (action not final for purposes of appeal where dispute over service of process not yet resolved by district court).

Insinga, 817 F.2d at 1470, n. 2. Thus, the Eleventh Circuit confirms in that footnote that if an *ad hoc* determination regarding the likelihood of further litigation against unserved defendants is necessary, it must occur in the district court, not the circuit court. *FSLIC v. Tullos-Pierremont* is again in accord with *Insinga* on this proposition, containing a similar footnote:

> Other courts agree that the district court, which is in a much better position than this Court to make a "further adjudication" decision, can always direct (under Fed. R. Civ. P. 58) that there be no entry of judgment or other dispositive order involving the served defendants if it believes that this is appropriate

> because within a reasonable time service will likely be obtained and further adjudication will occur as to the unserved defendants. *See, e.g., Insinga*, 817 F.2d at 1470 n. 2; *Leonhard,* 633 F.2d at 609 n. 9; *cf. Patchik,* 743 F.2d at 677.

FSLIC v. Tullos-Pierremont, 894 F.2d at 1474, n. 4.

The foregoing establishes that the Eleventh Circuit adheres to the bright-line rule of the other circuits regarding unserved defendants. Adherence to that bright-line rule, however, does not relieve the circuit court of its duty to inquire about the existence of jurisdiction over a judgment affecting less than all of the parties. *See Nagle v. Lee*, 807 F.2d 435 (5th Cir. 1985) (failure of the district court to dispose of all claims imposes upon the circuit court a duty to examine its appellate jurisdiction); *see also Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1976) (court must consider *sua sponte* whether it has jurisdiction to entertain an appeal).

In the present case, that is just what the Eleventh Circuit did – inquire. But rather than merely confirm that the two defendants, although subsequently added were and would remain unserved, Petitioner voluntarily dismissed them without prejudice thereby implicating and running afoul of Eleventh Circuit authority on dismissals affecting finality (discussed below). Thus it was the Petitioner's actions, not a rogue position of the Eleventh Circuit, that interfered with the applicability of the rule

regarding unserved defendants. Review of that issue by this Court is unwarranted.

II. THE ELEVENTH CIRCUIT ADHERED TO THE RULE THAT APPELLATE JURISDICTION OVER A JUDGMENT ADJUDICATING SOME CLAIMS CANNOT BE CREATED BY DISMISSING THE REMAINING CLAIMS WITHOUT PREJUDICE

In *State Treasurer of the State of Michigan v. Barry*, 168 F.3d 8 (11th Cir. 1999), the Eleventh Circuit articulated its position that appellate jurisdiction over an order adjudicating some claims cannot be created by dismissing the remaining claims without prejudice, but jurisdiction will lie where the remaining claims are dismissed with prejudice. The court held that "appellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims without prejudice." *Barry* at 11. But "[a]ll that defendant must do to appeal the partial summary judgment is have its remaining claims dismissed with prejudice". *Barry* at 12, *quoting Construction Aggregates, Ltd. v. Forest Commodities Corp.*, 147 F.3d 1334, 1337 (11th Cir. 1998), *cert. denied*, 526 U.S. 1039 (1999).

In justifying its holding, the court stated:

> [T]his Circuit has followed [this] rule for almost 25 years. . . . The final decision rule is well known and longstanding. It is clear, easy to follow, and promotes judicial efficiency,

> avoiding piecemeal appeals. Most importantly, the rule as it stands today is consistent with Rule 54(b), is faithful to the statutory language and policies underlying § 1291, and allows the district courts to retain control of their dockets.

Barry, 168 F.3d at 16. *Accord*, *Swope v. Columbian Chemicals Co.*, 281 F.3d 185 (5th Cir. 2002); *Chappelle v. Beacon Communications Corp.*, 84 F.3d 652 (2d Cir. 1996); *Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147 (10th Cir. 1992).[4]

Contrary to the definitive holding of *Barry*, Petitioner argues that the Eleventh Circuit stands alone in its view that jurisdiction is wanting even if the claimant has voluntarily dismissed his remaining claims with prejudice. (Petition at 9). In support of that theory, Petitioner does not and cannot cite *Barry*

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[4] As Petitioner states (Petition at 8), the First, Second, and Third Circuits are also in this "camp" requiring that a voluntary dismissal be with prejudice or its equivalent to create finality. *E.g.*, *Rabbi Jacob Joseph School v. Province of Mendoza*, 425 F.3d 207 (2d Cir. 2005); *John's Insulation, Inc. v. L. Addison & Assocs. Inc.*, 156 F.3d 101 (1st Cir. 1998); *Trevino-Barton v. Pittsburgh Nat'l Bank*, 919 F.2d 874 (3rd Cir. 1990). Petitioner also states that the Seventh, Eighth, and Ninth Circuits are in the "other camp" holding that a voluntary dismissal without prejudice is enough to confer appellate jurisdiction. *James v. Price Stern Sloan*, 283 F.3d 1064 (9th Cir. 2002); *Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538 (8th Cir. 1990); *Division 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1976). Those cases, however, provide little analysis as to how finality under § 1291 is satisfied where the dismissed claims may be filed again.

(which holds to the contrary) but instead relies upon *Druhan v. American Mut. Life*, 166 F.3d 1324 (11th Cir. 1999). *Druhan*, however, is significantly different. There, an insurance company which had been sued for fraud successfully removed the action arguing that it was preempted by the Employee Retirement Income Security Act (ERISA), and the plaintiff's motion for remand was denied. Believing the remand denial was wrong and not wanting to try her case under ERISA, plaintiff moved for and was granted a voluntary dismissal of her *entire claim* with prejudice, and then took an appeal. The Eleventh Circuit dismissed the appeal for lack of jurisdiction finding no adverseness because plaintiff was attempting to appeal the judgment she had requested.

Unlike the present case or *Barry*, *Druhan* does not involve the appealability of an order which adjudicates some claims where the remainder of the claims are voluntarily dismissed.[5] Indeed, in *Barry*, *Druhan* is specifically distinguished because of those different facts:

> Dismissing a single, remaining claim with prejudice for the purpose of making final a prior adverse ruling on a separate and

---

[5] *Druhan* does contain a lengthy footnote citing the Eleventh Circuit authority holding that it has no jurisdiction to hear appeals where the remaining claims are dismissed without prejudice, but then distinguishes that authority as inapposite there because Druhan had dismissed her *entire complaint*. *Id.* at 1325, n. 4.

> distinct claim is different from dismissing an entire complaint with prejudice which leaves no case or controversy to appeal. *See Druhan v. American Mutual Life,* 166 F.3d 1324 (11th Cir. 1999).

Barry, 168 F.3d at 15, n. 11. Accordingly, *Druhan* does not support, and *Barry* belies Petitioner's theory that the Eleventh Circuit will deny jurisdiction over an order adjudicating some claims even where the remaining claims are dismissed with prejudice.

In the present case, appellate jurisdiction was found lacking because of Petitioner's tactical decisions. His first notice of appeal was dismissed for lack of jurisdiction because his voluntary dismissal of the remaining claims was without prejudice (*see Barry*), and indeed his admission of refusing to dismiss with prejudice in order to preserve his remaining claims smacked of manufacturing jurisdiction. His second notice of appeal was dismissed for lack of jurisdiction because Petitioner's dismissal with prejudice had no legal effect since it was filed after the claims had already been dismissed and Petitioner did not first seek to have the claims reinstated in the district court. *See Barry*, 168 F.3d at 16 ("When such an attempt to craft jurisdiction [with a dismissal without prejudice] fails, the case is returned to the district court and the parties may seek to reopen the case and to reinstate the claim dismissed without prejudice.")

Indeed, Petitioner had several opportunities in this case to properly obtain appellate review. He could have sought a Rule 54(b) certification of the January

26th final judgment.[6] He could have merely confirmed upon the Eleventh Circuit's first request for advice on jurisdiction that the two subsequently added but yet unserved defendants would remain unserved and jurisdiction was proper under *Insinga*. He could have from the outset dismissed the unserved defendants with prejudice (as the City had requested). He could have sought a Rule 54(b) certification of the August 7th final judgment. And he could have sought to reinstate the claims he dismissed without prejudice before he attempted to dismiss them with prejudice.

Because the Eleventh Circuit's position on this issue, as articulated in *Barry*, is well-reasoned and consistent with several other circuits, and any inability to obtain appellate review resulted from Petitioner's tactical decisions, review of this case by this Court is unwarranted.

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[6] Contrary to Petitioner's claim, this Court rejected the notion that a Rule 54(b) certification should be granted only in the "infrequent harsh case," holding instead that "the decision to certify is with good reason left to the sound judicial discretion of the district court and should not be disturbed unless clearly unreasonable." *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980).

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be denied.

Respectfully submitted,

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March 2008

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

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March 23, 2007

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 07-11021-JJ
Case Style: Juan M. Perez v. City of Miami Beach
District Court Number: 05-21545 CV-JLK

NOTICE OF APPEAL FILED: February 23, 2007

After review of the district court docket entries, order and/or judgment appealed from, and the notice of appeal, it appears that this court may lack jurisdiction over this appeal. If it is determined that this court is without jurisdiction, this appeal will be dismissed.

The parties are requested to simultaneously advise the court in writing within fourteen (14) days from the date of this letter of their position regarding the jurisdictional question(s) set forth on the attached page. An original plus three copies of any response should be filed. The responses must include a Certificate of Interested Persons and Corporate Disclosure Statement as described in Fed.R.App.P. 26.1 and the corresponding circuit rules. Requests for extensions of time to file a response may not be entertained.

After fourteen (14) days, this court will consider any response(s) received and any portion of the record that may be required to resolve the jurisdictional issue(s). Please note that the issuance of a jurisdictional question does *not* stay the time for filing appellant's briefs otherwise provided by 11th Cir. R. 31-1.

Counsel who wish to participate in this appeal and who have not yet filed an appearance form must complete and return an appearance form within fourteen (14) days. Appearance forms are available on the Internet at www.ca11.uscourts.gov. The clerk may not accept motions or other filings from an attorney until that attorney files an appearance form. *See* 11th Cir. R. 46-1(e). Pro se parties and court-appointed attorneys are not required to file an appearance form.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Carol P. Lewis
(404) 335-6179

c: District Court Clerk

No. 07-11021-JJ

JURISDICTIONAL QUESTION(S)

Whether the district court's January 29, 2007, final judgment – which dismisses "the entire Complaint" with prejudice – is final and appealable, in light of the fact that summary judgment was entered only against the City of Miami Beach, while two other

defendants, Jorge Gonzalez and Patricia Walker, were added as defendants in the first amended complaint but otherwise were never served and did not appear in the case? *See* Fed.R.Civ.P. 54(b); *Insinga v. LaBella*, 817 F.2d 1469, 1470 (11th Cir. 1987); *Loman Dev. Co. v. Daytona Hotel & Motel Suppliers*, 817 F.2d 1533, 1536 (11th Cir. 1987).

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

For rules and forms visit
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September 14, 2007

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 07-14141-FF
Case Style: Juan M. Perez v. City of Miami Beach
District Court Number: 05-21545 CV-JLK

NOTICE OF APPEAL FILED: September 1, 2007

After review of the district court docket entries, order and/or judgment appealed from, and the notice of appeal, it appears that this court may lack jurisdiction over this appeal. If it is determined that this court is without jurisdiction, this appeal will be dismissed.

The parties are requested to simultaneously advise the court in writing within fourteen (14) days from the date of this letter of their position regarding the jurisdictional question(s) set forth on the attached page. An original plus three copies of any response should be filed. The responses must include a Certificate of Interested Persons and Corporate Disclosure Statement as described in Fed.R.App.P. 26.1 and the corresponding circuit rules. Requests for extensions of time to file a response may not be entertained.

After fourteen (14) days, this court will consider any response(s) received and any portion of the record that may be required to resolve the jurisdictional issue(s). Please note that the issuance of a jurisdictional question does *not* stay the time for filing appellant's briefs otherwise provided by 11th Cir. R. 31-1.

Counsel who wish to participate in this appeal and who have not yet filed an appearance form must complete and return an appearance form within fourteen (14) days. Appearance forms are available on the Internet at www.call.uscourts.gov. The clerk may not accept motions or other filings from an attorney until that attorney files an appearance form. *See* 11th Cir. R. 46-1(e). Pro se parties and court-appointed attorneys are not required to file an appearance form.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Marcus Simmons
(404) 335-6175

c: District Court Clerk

No. 07-14141-FF

JURISDICTIONAL QUESTION

Whether the district court's August 7, 2007, judgment granting summary judgment in favor of Defendant City of Miami Beach, is final and immediately appealable in light of (1) the plaintiff's voluntary dismissal of his claims against the remaining defendants

without prejudice; and (2) the district court's failure to certify the August 7 judgment for immediate appeal pursuant to Fed.R.Civ.P. 54(b)? *See* 28 U.S.C. § 1291; Fed.R.Civ.P. 54(b); *State Treasurer of the State of Michigan v. Barry*, 168 F.3d 8, 11-16 (11th Cir. 1999); *Constr. Aggregates, Ltd. v. Forest Commodities Corp.*, 147 F.3d 1334, 1336-37 (11th Cir. 1998); *Mesa v. United States*, 61 F.3d 20, 22 (11th Cir. 1995); *Williams v. Bishop*, 732 F.2d 885, 885-86 (11th Cir. 1984); *Lex Tex Ltd. v. Unifi. Inc. (In re Yarn Processing Patent Validity Litig.)*, 680 F.2d 1338, 1340 (11th Cir. 1982).

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(3)

No. 07-1092

FILED

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

JUAN PEREZ,

Petitioner,

v.

CITY OF MIAMI BEACH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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ARGUMENT

Respondent has presented a revisionist history, obscuring the troubling Circuit splits described in the Petition. It has misstated the basis of the Eleventh Circuit's ruling; inaccurately asserted that the Eleventh Circuit allows claimants to receive immediate appellate review by voluntarily dismissing all remaining claims with prejudice; and contrived the *post hoc* excuse that Petitioner's "tactical decisions" foreclosed review, notwithstanding Respondent's admission below that no improper tactics occurred.

The Eleventh Circuit's ruling conflicts with the approach of many other Circuits. Even Respondent, in its penultimate sentence (Br. in Opp. 12), can say only that the ruling below is consistent with "several other circuits" – an implicit concession that it is inconsistent with others. The division of authority is real and pronounced, and will continue to cause confusion in the federal system until resolved by this Court.

I. Respondent Has Not Accurately Characterized the Basis for the Eleventh Circuit's Ruling

There is nothing in the Eleventh Circuit's ruling or prior precedent to suggest that the reason the Eleventh Circuit found appellate jurisdiction lacking here was "because Petitioner's dismissal with prejudice had no legal effect since it was filed after the claims had already been dismissed and Petitioner did

not first seek to have the claims reinstated in the district court." Br. in Opp. 1. The basis for the ruling is stated in the Eleventh Circuit's order, and Respondent has not even attempted to dispute that it is in conflict with the rulings of virtually every other Circuit.[1]

The order states that Petitioner's "subsequent voluntary dismissal of his remaining claims with prejudice did not render the district court's August 8 order and judgment final or immediately appealable. *See Druhan v. Am. Mutual Life*, 166 F.3d 1324, 1326-27 (11th Cir. 1999); *Mesa v. United States*, 61 F.3d 20, 21-22 (11th Cir. 1995)." App. 2. Neither *Mesa* nor *Druhan* denied appellate jurisdiction on the ground that some kind of procedural oversight precluded the appeal. *Mesa* did so because the plaintiffs had not

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[1] If, as Respondent argues, the basis for the Eleventh Circuit's ruling were truly that Petitioner had bungled the situation by filing his voluntary dismissal with prejudice after already having filed a voluntary dismissal without prejudice and then failing to formally reinstate those claims, the court's order dismissing Petitioner's second appeal would have said so. But the order says no such thing. In fact, the order dismissing Petitioner's second appeal, other than changing the applicable dates and changing the term "without prejudice" to "with prejudice," is identical to the order dismissing his first appeal – an order which predated Petitioner's allegedly improper procedural maneuvers. The language of the two orders is effectively identical precisely because the reasoning animating them is effectively identical: that a claimant's voluntary dismissal of his remaining claims, whether made with or without prejudice, does not render final an order dismissing his principal claim.

sought a Rule 54(b) certification after they voluntarily dismissed their remaining claims without prejudice. 61 F.3d at 22. The court expressly rejected the Third Circuit's rule, which holds that the "without prejudice" nature of a voluntary dismissal is not necessarily disqualifying, because some voluntarily dismissed claims cannot possibly be revived – for example, when the statute of limitations has expired. *Id.* at 22 & n.6. *Druhan* denied appellate jurisdiction because the plaintiff voluntarily dismissed her *entire complaint* with prejudice after the district court refused to remand it to state court, and the Eleventh Circuit ruled that "there is no case or controversy," and that the plaintiff had tried to transform an *inherently* interlocutory order (a denial of remand) into a final one. *Druhan*, 166 F.3d at 1326.

In the case at bar, the Eleventh Circuit's citation to *Mesa* and *Druhan* therefore reflected the court's holding that Petitioner's voluntary dismissal of his claims against the two unserved defendants, even though made expressly "with prejudice," did not render an adverse final order creating appellate jurisdiction. That holding conflicts with the view of many other Circuits, indeed all of them. *See* Pet. 7-9, 12-16. Respondent never even tries to dispute the existence of the conflict, nor to refute the systemic harms it has inflicted. *See* Pet. 7, 25, *quoting* R. Cochran, *Gaining Appellate Review By "Manufacturing" A Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 MERCER L. REV., 979, 985 & 1021 (Spring 1997) (the Circuit split has "needlessly

plagued district and appellate courts[,]" leaving them "frustrated and uncertain").

Respondent also cites *State Treasurer of the State of Michigan v. Barry*, 168 F.3d 8 (11th Cir. 1999), for the same proposition – that the Eleventh Circuit is "consistent with several other circuits" because it allegedly shares the view that "jurisdiction will lie where the remaining claims are dismissed with prejudice" (Br. in Opp. 8, 12). Respondent quotes *Barry*'s statement that "[a]ll that defendant must do to appeal the partial summary judgment is have its remaining claims dismissed with prejudice." 168 F.3d at 12. But this passive voice construction – "where the remaining claims are dismissed" and "have its claims dismissed" – is purposeful. The court in *Barry* did not say that it would accept jurisdiction if a claimant *voluntarily* dismissed the remaining claims with prejudice. It said that jurisdiction would lie if the claimant would "have its remaining claims dismissed." *Barry*, 168 F.3d at 12, *quoting Construction Aggregates, Ltd. v. Forest Commodities Corp.*, 147 F.3d 1334, 1337 (11th Cir. 1998). The court's authority for this statement was a case where the dismissal of the remaining claims was *involuntary*, because the claimant had failed to prosecute his claim. *Morewitz v. West of England Ship Owners Mut. Protection and Indem. Ass'n*, 62 F.3d 1356, 1361 (11th Cir. 1995). There is no case in which the Eleventh Circuit accepted appellate jurisdiction where the claimant tried to create finality by voluntarily dismissing his or her

remaining claims with prejudice; and in the case at bar, it denied jurisdiction.[2]

It is also incorrect for Respondent to assert (Br. in Opp. 1-2, 7) that the Eleventh Circuit would have accepted jurisdiction over Petitioner's appeal if he had made no effort to voluntarily dismiss the unserved defendants. The mere fact that the Eleventh Circuit posited its first jurisdictional question to the parties, Res. App. at 2-3, disproves this assertion. In posing that jurisdictional question, the court stated its awareness of the fact that the two individual defendants had not been served. *Id.* If, as Respondent asserts, the Eleventh Circuit adheres to the bright-line rule that unserved defendants automatically do not count for finality purposes, there would have been no reason for the court to raise a jurisdictional question in the first place.

But the court not only asked the question. It actually did dismiss the appeal the first time, citing footnote 2 of *Insinga v. LaBella*, 817 F.2d 1469 (11th Cir. 1987), where the court eschewed other Circuits' bright-line rule discounting unserved defendants, and

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[2] Forcing a claimant to induce a "with prejudice" dismissal via lack of prosecution is precisely the sort of wasteful litigation that the final judgment rule seeks to avoid. *See* Pet. 17-21. The Eleventh Circuit recognizes appellate jurisdiction where the "with prejudice" dismissal results from a claimant's refusal to prosecute his or her remaining claims, but arbitrarily denies jurisdiction where the "with prejudice" dismissal results from the claimant's effort to expedite matters by voluntarily dismissing such claims.

instead adopted an *ad hoc* exception that discounts unserved defendants only where it is not "premature to assume that service will not be made." *Id.* at 1470 n.2. Respondent misconstrues the import of this footnote by emphasizing (Br. in Opp. 6) that it is the district court, rather than the appellate court, that will make this *ad hoc* determination. For purposes of this Petition, that is irrelevant. The relevant point is that, when deciding whether finality exists over an involuntarily dismissed claim, the Eleventh Circuit, unlike most other Circuits, does not automatically discount claims that remain against unserved defendants. The most Petitioner could have hoped for here was to have the Eleventh Circuit speculate about whether service was likely to be accomplished – speculation that creates a haze of uncertainty in an area where clarity is a virtue. *See* Pet. 24-25. And none of Respondent's arguments disclaims a Circuit split on this question, a reality that is beyond dispute. *See* Pet. 11 n.1 (citing cases explicitly recognizing the Circuit split).[3]

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[3] *Accord Brown v. Fisher*, No. 06-3207, 2007 WL 3011051, *4 (10th Cir., Oct. 16, 2007) (unpublished) ("declin[ing] to adopt the bright line rule" of the Fifth Circuit).

II. Because Petitioner Did Not Employ Any Improper "Tactical Decisions" That Would Have Precluded Appellate Jurisdiction, This Petition Presents An Ideal Vehicle to Resolve the Division of Authority

There is no merit to Respondent's assertions (Br. in Opp. 11) that Petitioner's conduct "smacked of manufacturing jurisdiction" and that Petitioner's voluntary dismissal of his remaining claims with prejudice "had no legal effect since it was filed after the claims had already been dismissed and Petitioner did not first seek to have the claims reinstated in the district court." Of course, the avowed purpose of Petitioner's voluntary dismissals was to "manufactur[e]" jurisdiction – or, dispensing with the pejorative label, to create finality. But the sequence of Petitioner's voluntary dismissals was not the rationale for the Eleventh Circuit's ruling.

There was nothing untoward about Petitioner's initial refusal to make a "with prejudice" dismissal of his remaining claims. Indeed, several Circuits accept immediate appellate jurisdiction even if the dismissal is made without prejudice. *See* Pet. 8. Moreover, Respondent repeatedly represented to the lower courts that it saw nothing improper about Petitioner's conduct. When the Eleventh Circuit posed its first jurisdictional question (after the "without prejudice" voluntary dismissal), Respondent explicitly approved of Petitioner's steps to create finality. App. 30-31. Then, after the Eleventh Circuit nevertheless dismissed the

appeal and Petitioner returned to the district court, Respondent stated:

> Because of the representations by the Plaintiff's counsel regarding the dismissal of the two unserved Defendants . . . , including his written representation to undersigned counsel that if the Eleventh Circuit remands the case that he will file the appropriate dismissals, the Defendant . . . does not oppose the entry of Final Summary Judgment against the Plaintiff since the unserved Defendants can never be brought into this action in light of the running of the statutes of limitation, the 120 day limit to serve parties, and the stipulation of counsel that the Plaintiff will not be pursuing this action against the two unserved Defendants.

App. 39-40.

Equally incorrect is Respondent's assertion (Br. in Opp. 11) that Petitioner's "with prejudice" dismissal of his remaining claims "had no legal effect since it was filed after the claims had already been

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[4] The parties of course could not confer jurisdiction where it is otherwise lacking. *E.g.*, *Beck v. Alabama*, 447 U.S. 625, 630 n.6 (1980). But it is remarkable that a litigant which wholeheartedly endorsed certain procedural steps has suddenly – once the possibility of Supreme Court review looms – reversed course and decried those steps as improper efforts to "manufactur[e] jurisdiction." We respectfully submit this is merely a distraction technique, designed to obscure the Eleventh Circuit's actual holding and the Circuit splits that exist.

dismissed and Petitioner did not first seek to have the claims reinstated in the district court." As stated previously, the Eleventh Circuit's order does not say a word about this – and with good reason. There is no requirement that a claimant formally reinstate his or her claims after voluntarily dismissing them without prejudice, all so that immediately upon reinstatement he or she can then voluntarily dismiss them with prejudice. Respondent's only asserted authority for such a non-existent rule is an off-point line from *Barry*, in which the Eleventh Circuit stated that "the parties *may* seek to reopen the case and to reinstate the claim dismissed without prejudice." 168 F.3d at 16 (emphasis supplied). This is far from imposing a requirement that the claimant *must* reinstate the claims to achieve finality, especially where, as here, the claimant's unconditionally-expressed intention was immediately to voluntarily dismiss those claims with prejudice – not to prosecute them further.[5] Indeed, *Barry* itself suggests that the Eleventh Circuit rejects the formalistic reinstatement requirement that Respondent claims it espouses. *Cf. id.* at 13 n.8 (distinguishing cases permitting immediate appeals where "the parties have renounced their ability to

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[5] *Cf. Wynn v. Nat'l Broadcasting Co., Inc.*, 2002 WL 31681865, *1 (C.D. Cal., Mar. 6, 2002) (accepting plaintiff's notice of voluntary dismissal without prejudice of certain claims, even though those claims "have already been dismissed" by virtue of court order).

proceed on their remaining claims after the appeal is decided").[6]

Moreover, the extra procedural step that Respondent would impose – a motion in the district court to reinstate the voluntarily dismissed claims, presumably to be brought under Federal Rule of Civil Procedure 60(b) – would be anything but a *fait accompli*. The granting of such a motion is inherently discretionary, *e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-34 (1995), meaning that Petitioner's right to appeal would be diminished to a roll of the dice. And even if a claimant could be certain that the motion to reinstate would be granted, a rule requiring this extra step would run counter to the final judgment rule, which after all is designed to avoid wasteful litigation. In short, Respondent's *post hoc* argument that Petitioner's voluntary dismissal with prejudice "had no legal effect" is baseless.

* * *

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[6] Even assuming, *arguendo*, that the Eleventh Circuit did impose a requirement of formal reinstatement, that would create yet another Circuit split. *See Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1076 (9th Cir. 1994) (plaintiff's "without prejudice" dismissal was insufficient to create finality but "dismissal [by the appellate court] is not fatal to the plaintiff's desire for quick review; they can return immediately to this court either by dismissing the § 11 claim with prejudice (and thus 'finalizing' the partial summary judgment) or by persuading the district court to issue a Rule 54(b) certificate").

Respondent summarizes (Br. in Opp. 11-12) by listing five ways in which it asserts Petitioner could have obtained appellate review. None of these points survives scrutiny.

First, Respondent posits that Petitioner could have sought a Rule 54(b) certification of the district court's first final judgment. But this does not answer our point that doing so would have diminished Petitioner's right to appeal into something much less than that. As Respondent concedes (Br. in Opp. 12 n.6), certification is left to the district court's discretion. *See* Pet. 22.

Second, Respondent repeats the fiction that the Eleventh Circuit would have accepted jurisdiction if Petitioner had answered the court's jurisdictional question by merely repeating what the court indicated in its question it already knew – that the remaining defendants were unserved. We have already addressed this point. *See supra* 5.

Third, Respondent asserts that Petitioner could have, from the very outset, made his voluntary dismissal explicitly with prejudice. That is true but irrelevant. As previously explained, *see supra* 7-9, there is no logical or doctrinal reason why Petitioner's "with prejudice" voluntary dismissal, entered only after the Eleventh Circuit denied jurisdiction the first time, would have been any less effective than a "with prejudice" voluntary dismissal made at the outset. The other Circuits would accept either one, but the

ruling below indicates that the Eleventh Circuit would accept neither.

Fourth, Respondent repeats that Petitioner could have sought a Rule 54(b) certification, this time after the district court entered its second final judgment. This argument fares no better than Respondent's first argument about a possible Rule 54(b) certification. In either circumstance, what Petitioner would have received is considerably less than the ironclad right to appeal.

Fifth and finally, Respondent posits that Petitioner could have sought to reinstate the claims he dismissed without prejudice before he attempted to dismiss them with prejudice. As previously explained, there is simply no requirement for such a step, it would not have provided Petitioner an absolute right of appeal, and imposing such a requirement would be contrary to the animating thrust of the final judgment rule.

In a sense, this list of five possibilities only serves to highlight Petitioner's predicament and belie Respondent's mis-characterization of the Eleventh Circuit's ruling. Petitioner has been stripped of the right to appeal, a result which would not have obtained if his suit had originated in virtually any other Circuit. There is nothing in Respondent's brief that controverts the existence of wide and profound Circuit splits in this area – splits of authority that are harming both the lower courts and litigants.

III. The Questions Presented Warrant Review By This Court

Respondent makes no effort to dispute that the Eleventh Circuit's ruling undermines, rather than furthers, the important values served by the final judgment rule. *See* Pet. 17-24. Nor does it refute the reality in this area that "splits and intracircuit inconsistencies leave district court litigants and judges frustrated and uncertain about which procedure will satisfy the appellate courts and permit an appeal to go forward." R. Cochran, *supra*, at 985. Here, Petitioner did everything he reasonably could to secure his right to appeal, and each step of the way, Respondent consented and the district court endorsed the procedure. Nevertheless, twice the Eleventh Circuit found such steps inadequate and denied jurisdiction. Petitioner has now been stripped of his right to appeal.

There are compelling reasons to address the questions presented now, not later in a different case. The lower courts have been struggling with these questions for several decades now, and along the way, countless legitimate appeals have been squandered and countless more have forced appellate courts to navigate thorny and time-consuming jurisdictional issues. The solution is a uniform and clear answer, something only this Court can provide. This case presents an ideal vehicle because there are no procedural impediments to this Court's review, and the ruling below has staked out an extreme position that

is at odds with that of every other Circuit to confront the question.

CONCLUSION

For the reasons stated, the Court should grant the Petition.

Respectfully submitted,

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